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THE
PRACTICE
OF THE
COURTS
OF
King's Bench and Common Pleas.

PART I.

BY BAKER JOHN SELLON, Esq.
BARRISTER AT LAW.

K

Candidus imperti; si non, his utere mecum.

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P R E F A C E.

THE following pages are introduced to the Profession, as a mere compilation. Indeed, the nature of the work precludes every idea of originality. A Book of Practice can be little more than a collection of dry abstract forms and rules, and of adjudged cases thereon. To digest, and apply these rules and forms; to select the most useful and approved cases; to arrange them under their respective heads; to reduce the practice, as much as possible, to principle; and, to elucidate the whole by the general introduction of order and method, is the utmost that can be attempted in a work of this kind. To effect this, has been the earnest endeavour of the Editor, who humbly trusts, that he has not laboured altogether in vain.

It may be proper to observe, that the present publication is intended, not as an addition to the number of books of practice now extant, but as in *lieu* of one of them. The most useful of the kind, considering it as a common place-book of practice, is that published by the late Mr. Crompton; at the same time, it must be confessed, that

it is rather a sketch than a finished piece. Had that author lived, he would probably have completed a work so successfully begun; it was the unfortunate circumstance of the Profession being deprived of his further labours, that first suggested to the Editor the idea of this undertaking; and although he is aware that the plan pursued in this work materially varies from the one adopted in that; and that the whole, when finished, will assume a very different shape and form; yet, in order to avoid the *possibility* of imputation of infringing, in the smallest degree, upon literary property, (which the Editor holds most sacred,) he has purchased the copyright of Mr. Crompton's work by way of removing every prejudice from the publication of his own.

The intent of a Book of Practice is, to point out the modes of commencing and prosecuting actions; but these modes vary according to the nature of the action and the situation of the parties concerned. For an action may be either a *common* personal action, brought by and against *common* persons; that is to say, such as sue and are sued in their own right, and who are in no respect privileged; or, it may be of a *particular* kind, or brought by or against *particular* persons; namely, such as sue or are sued in any relative capacity and not in their own right, or who are entitled to any peculiar privilege. This distinction forms the general division of the work into, first, *The Mode of proceeding in all COMMON Cases* where the action is a common personal action,

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action, and brought by and against common persons; and, secondly, *The Mode of proceeding in PARTICULAR Cases*; namely, either where the action is of a particular kind, such as *ejectment*, *replevin*, and the like; or where it is brought by or against particular persons, as *executors*, *members of parliament*, *attornies*, and the like. The first volume treats of the mode of proceeding in all *common cases*. The proceedings in *particular cases*, together with some detached heads of practice, relating generally to all actions, as *amendment*, *discontinuance*, *costs*, and the like, will form the contents of the second volume.

Whenever any action is brought, certain process issues to compel the defendant's appearance in court to answer the plaintiff's charge. But this process materially varies, according to the manner in which the action is first commenced, and the circumstance of its being bailable or not. Perhaps there is no part of the practice more difficult to be understood by the student, than that relating to original writs and mesne process; the Editor, therefore, has particularly endeavoured to be clear and explicit upon this head; for which purpose, he has first considered the several ways of commencing personal actions in the two courts: he has then pointed out in what actions special, or common bail is required; and has afterwards proceeded to consider the process or means of compelling the defendant to appear, first, in actions not bailable, and next, in bailable actions: carefully observing to treat of the practice in both

kinds of actions, separately and distinctly, until the *declaration*; at which period, the parties being once in court, the distinction which before prevailed, in a great measure ceases: the future proceedings will be therefore considered, under one head.—Such is the general division of the work, and also the particular mode of treating this first part of the proceedings, now presented to the reader.

But further, in the general *plan* of the work certain traits will be found peculiar to this Book of Practice. All the positive practical directions, pointing out what is to be done, how, when, and where, which may be termed the mere routine of business, are printed, for distinction's sake, in *italics*, so that the practitioner may, at one glance, discover how to proceed. The adjudged cases, immediately applicable to each stage of the proceedings, are afterwards arranged in due order, serving as a *comment* upon the *text*. Again, the work is divided into chapters, and the chapters subdivided into distinct heads, to which letters are annexed, as marks of reference, upon the principle adopted in Comyn's Digest. To the cases cited, not only the name of the reporter, but of the case itself, is subjoined. Whenever therefore any *dictum*, or assertion, stands unsupported by authority, the reader is advised to pay no more attention to it than he thinks it merits. Lastly, at the end of the volume will be added an Appendix, (to which, in this first part, frequent references are made,) which will contain, as well

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observations

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observations upon the practice, the history, and origin thereof, and the difference, in many cases, between the ancient and modern proceedings; as also, the forms of writs, notices, and the like; and such other remarks as may be useful to the student, but which, had they been interspersed throughout the body of the work, might have occasioned too many interruptions and digressions.

It may be easily discerned, that the chief objects at which the Editor has most earnestly aimed, are, system and method. He well knew indeed, that they were the only means by which he could hope to attain the end proposed to himself by the following work; namely, to render the practice plain and intelligible to the ignorant; and to present, at least, an useful common-place book, to the experienced.

Such as it is, he now presumes to commit this first part to the candour of the Profession—upon their candour he must rely, conscious of the many inaccuracies and omissions with which it abounds. Permit him, however, to add, that any communication or intelligence, by way of correcting those inaccuracies, or supplying those omissions, or of furnishing matter for any future part of the work, will be gratefully received. And it should be remembered, that such assistance will not only be a private accommodation to the Editor, by lightening the burthen of his labour; but it may also prove a public benefit to the Profession: for by rendering the work more perfect, it will consequently become more generally useful.

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Had

P R E F A C E.

Had the Editor, upon his first entering on this undertaking, been aware of the many and great difficulties attending the progress of it; they would probably have deterred him from the attempt; but having attempted, he is now resolved, to the best of his abilities, to execute. The Profession may therefore rely upon the remainder of the work being forwarded with all possible dispatch.

SERLE-STREET,
LINCOLN'S-INN,
July 1, 1792.

B. J. S.

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ERRATA.

In page 33. E. 4. it is said, that no more than *four defendants must be put into one writ*; but the practice in this respect, as laid down by one or two late decisions, is, that in actions *not* bailable, the process is a mere notice; and therefore any number of defendants, and different causes of action, may be inserted in one writ. But where the action is *bailable*, and the writ is therefore with an *ac-etiam*, only one defendant must be named (except in a joint action); for the *ac-etiam* was introduced as a substitute for the original, and no more can be inserted in an original writ.

In page 162, line 17, for post, sec. 7. D.—*read* post, sec. 8. A.

INTRODUCTORY OBSERVATIONS

UPON

A. The Terms.

B. The particular Days in the Terms.

(B 1.) *The Effoin Day.*

(B 2.) *The Day of Exception.*

(B 3.) *The Day of the Return of Writs, or, Retorna
Brevium Day.*

(B 4.) *The Day of Appearance.*

C. The Days that are not juridical, or, DIES
NON JURIDICI.

D. The Practice of prosecuting and defending
Suits by Attorney, and herein of

(D 1.) *The Origin of this Practice.*

(D 2.) *The Warrant of Attorney to prosecute and defend.*

(D 3.) *The Memorandum, or, Minute of the Warrant,
agreeable to the Stat. 25 G. 3. c. 80.*

A. The Terms.

THE Terms are those times or seasons of the year in which the Courts of Law sit for the dispatch of business. The terms
what.

B

Writs

Derivation thereof.

Writs were always returnable at certain stated days in different seasons of the year. These Returns, or *Termini ad Quos*, when they fell very near together, collectively constituted a period of legal business, which was called generally *Terminus*, or *Term*. 2 Reeve's Hist. 56.

Their origin.

The division of the year into Term and Vacation, has been the joint work of the *Church* and *Necessity*. The cultivation of the earth, and the collection of its fruits, necessarily required a time of leisure from all attendance on civil affairs; and the laws of the *Church* had at various times assigned certain seasons of the year to an observance of religious peace, during which, all legal strife was strictly interdicted. What remained of the year not disposed of in this manner, was allowed for the administration of justice. The *Anglo-Saxons* had been governed by these two reasons in distinguishing the periods of Vacation and Term; the latter they called *Dies Pacis Regis*, the former, *Dies Pacis Dei et sancta Ecclesia*. The particular portions of time which the Saxons had allowed to these two seasons, were adhered to by the Normans, together with the Saxon usages, and continued until altered from time to time by future statutes. In the latter part of the Saxon times, and in the reigns of William the Conqueror, Rufus, and John, the Terms were almost in the same state as they are now, and by them the returns of writs and appearances were governed. 1 Reeve, 191. 3 Black. Com. 277.

By what courts they are observed.

The only courts confined to the Terms, are the courts of King's Bench, Common Pleas, and Exchequer (the highest courts at common law). The court of Chancery is not confined to them; nor are they observed by the high court of Parliament, the Privy Council, the court of Lord High Steward, or the inferior courts. And it is said, that the Exchequer may sit out of Term. Mad. 551.

Their number and names.

Of these Terms there are four in every year, viz. *Michaelmas Term*, *Hilary Term*, *Easter Term*, and *Trinity Term*. The times when they respectively begin and end, may be seen in the Table of the Terms and Returns at the end of these Introductory Observations.

Their kinds, fixed and movable.

The two first of these Terms are called, *Fixed Terms*, as invariably beginning on certain fixed days in the year; and

23] PARTICULAR DAYS IN THE TERMS.

and the two last, *Moveable* Terms, their commencement being regulated by *Easter* Day and *Corpus Christi* Day, both of which are moveable feasts, not falling on any certain fixed days.

Also two of the Terms, namely, *Hilary* and *Trinity*, are called *Issuable* Terms; because in them the Records are for the most part made up of the Issues joined in the various causes depending, and which are to be tried at the assizes that respectively follow these Terms. Issuable Terms.

There are four particular days in Term; the *Essoin* Day, the *Exception* Day, the *Return* Day, and the *Appearance* Day, called the *Quarto Die post*. Of the particular days in Term.

The first day in Term, is in law, the day that is called the *Essoin* Day, of which an account will be presently given; but the courts do not sit till the *Quarto Die post*, and if that be Sunday, not till the Monday following. Which the first day in Term.

The Term regularly is esteemed as one day; and therefore if a deed be said to be inrolled in such a Term; it shall be intended the first day. So if a Declaration be entitled generally of a Term, it shall be deemed a Declaration of the first day of the Term. The Term deemed as one day.

But where the day is material, it may be alleged, that the thing was done on such a particular day in the Term; and it may be pleaded specially according to the fact, or evidence thereof given upon the trial, agreeable to the maxim, *Fictio cedit Veritati*. Except it be material to the justice of the case.

23. The particular Days in the Terms.

[There are four particular days in Term; the *Essoin* Day, the *Exception* Day, the *Return* Day, and the *Appearance* Day, called the *Quarto Die post*.]

IN all *personal* actions, the process according to the ancient institution was, first, for the sheriff to summon the defendant; which was done either personally, or the summons was left at his house; and the sheriff

returned either *Summoneri feci*, or *Nil habet in Ballivâ meâ per quod summoneri potest*; on this summons the party either appeared, or *essoined*, or made default; if he appeared, the plaintiff proceeded against him, and defendant pleaded. If he *essoined* (that is, sent his *excuse* for not appearing), the excuse was to be sent on the day the writ was returnable; for if he omitted that day, plaintiff's *exception* might be entered the next day to his non-appearance, and he might have an order that the defendant's *Essonium non recipiatur*; and from this *exception*, so taken and entered, the *second* day, after the return of the writ, was called the Day of *Exception*. The *third* day the sheriff returned his writs into court, which were delivered into the custody of the *Custos Brevium*; and then it was that the court was seized of the cause by the possession of the writ. The *fourth* day was called the *Appearance Day*, or *Dies Amoris*; which was the time granted *ex gratiâ* for the party to appear. If the party did not then appear, the plaintiff offered himself, and the Filazer recorded his appearance, and the return of the summons by the sheriff, and defendant was proceeded against by attachment and distress infinite, or by *copias*, as the nature of the case might warrant. Gilb. C. P. 13.

Such is the general explanation of the particular days abovementioned; but as it may be too concise to convey a sufficient idea of their nature and meaning, we will proceed to give a more full account thereof. And first, of

(B 1.)

Its derivation.

Essoin is derived from the French *essoiner*, or *exonier*, to *excuse*; and is an allegation of an excuse from one that is summoned, for his not appearing and answering to the action.

(B 1.) *The Essoin Day.*

These essoins, or excuses, were allowed by the law, to the end that no person might be surprised or prejudiced by his absence, provided he had just cause to be excused by any thing that was not owing to his own default. Booth, 14.

Of the different kinds of essoins.

There were *five* kinds of essoin: 1. *De servitio Regis*, being in the king's service. 2. *In terram sanctam*, being absent in the Holy Land. 3. *Ultra mare*, being beyond sea.

fea. 4. *De malo lecti*, being ill in bed; and 5. *De malo veniendi*, being seized with sudden illness or infirmity on the way; this last was called the *common* essoin.

These essoins were allowed not only in *real*, but in *personal* actions; and *all* persons might essoin themselves except *minors*, disseizors, and a few others.

When allowed.

The *time* for making the essoin was, as before observed, the first day; that is, on the return of the writ; but it was sometimes even allowed on the second or third day, if no *exception* was entered by the other party.

At what time, and in what manner named.

The *mode* of making, or, as it is termed, *casting* an essoin, was in open court, before the justices, who sat on that day for the purpose of receiving the essoins; they were made by the servant of the party essoining, or by a *nuntius* or messenger, or a person called an *essoniator*, according as the case might be; for particular essoins were cast by particular persons.

If, at the first summons, the common essoin *de malo veniendi* was cast, it was the ancient practice for the complainant, upon his appearing in court, (provided he doubted the truth of the essoin or excuse,) to demand from the *essoniator*, or person who made it, a lawful proof of the essoin on the very day; or that he should find *pledges*, or make a solemn engagement to bring a warrant or proof of the essoin; that is, the principal summoned, at a day appointed. And attachments issued against the *essoniators* *tanquam falsarios*, if they failed in the performance of the engagement they had made for their principal. But so early as the reign of Henry III. we find this practice disused; and except in particular cases, of barons and other great persons, who could well command a security, and upon whom the law still imposed the burden of finding pledges, *essoniators* were not required to give any security, but merely pledged their faith, to which credit was always given, that they would produce their principal at another day, to warrant the essoin, and prove it upon his oath.

Of the proceedings thereon.

1 Reeve, 116.

1 Reeve, 406.

In the above manner might the tenant or defendant be essoined three times successively; and if he did not come at the third day, nor send an essoin, the court awarded

How often essoined.

1 Reeve, 115.

What done on
appearance.

Consequence of
not appearing.

The law of
essoins intricate.

Delay great,
especially by
fourcher by *essoins*.

2 Reeve, 122.

2 Inst. 250.

Practice of
essoins ex-
ploded.

that he should appear on another day, in person, or by a sufficient attorney (or *responsalis*, as he was then called), who would be received *ad lucrandum vel perdendum* in his place. If the party summoned, appeared on the fourth day after three *essoins*, and avowed them all, he was required to prove the truth of them by his own oath and that of another, and on the same day was to answer the action; and if he did not appear on the fourth day, nor send his attorney, his land was taken into the king's hands.

The law respecting *essoins*, of the time of casting them, and by whom, and in what order, for there was a particular order also in which they were to be cast, was very intricate; and in former times, when the parties were anxious to take every advantage of the practice, was much studied and attended to.

Great and grievous was the delay occasioned by this practice. In one instance, indeed, it was carried to an almost infinite length; which was, where there was an *essoins* *simul et vicissim*, or, as it was called, a *fourcher* by *essoins*: thus, when a *præcipe* was brought against two or more tenants, and after each had had one *essoins*, which was by law due to them, they further delayed the demandant by alternately successive *essoins*. As for instance, a *præcipe* is brought against A and B; A is *essoined*, and B appears, and hath *idem dies* given him, that is, some future day for his appearance; at which day A appears, and B is *essoined*, and A hath *idem dies* given him; so far was usual; but then at the last mentioned day given, A is *essoined* again, and B appears, and so on alternately; this was called *fourcher*; that is, to divide, because they divided themselves in delay of the demandant by *essoins* and appearances interchangeably. This custom was carried to such excess, that in the reign of Edw. I. the legislature thought proper to interpose, and put a stop to it, by enacting, by the 3d Edw. I. c. 1. and 6 Edw. I. c. 10. that such tenant shall no more *fourch*, but have only one *essoins*.

As this practice of *essoins* (than which there could not perhaps be a greater grievance in judicial proceedings) is nearly exploded, and the law thereon become almost obsolete; it might be thought useless to say more upon the subject: the above being sufficient both to explain

explain the nature and meaning of those days in the Terms, called *Essoin Days*, of which frequent mention is hereafter made, and to shew, in this instance, (as may be found in many others,) the great superiority and liberality of the modern practice, when compared with the ancient.

But, although the practice of *essoining* is nearly, yet it is not *wholly*, disused. In *real* actions, essoins may still be cast, which are entered in the office of the *Clerk of the Essoins*, where also the demandant, or plaintiff, may enter a *ne recipiatur*, if the essoin be not made in time. So in actions against peers and members of parliament, where the process is by *summons* and *distress*, the defendant may still cast an essoin; but the court will watch over the proceeding with a strict eye, and be glad to use any means to prevent such a delay. *Anson v. Jefferson*, 2 Wil. 164. *Rooke v. the Earl of Leicesters*. 2 D. & E. 16.

In what cases essoins may be now cast, and how.

But it is now settled, that there can be no essoin in a *personal* action. *Argent v. the Dean and Chapter of St. Paul's*. E. 23 G. 3.

In what not.

Nor is a corporation entitled to an essoin. *Id.*

Where an essoin is cast, the parties should adjourn it to a particular day; but if that be not done, nor any motion made to quash the essoin, the plaintiff may still deliver declaration on the first day of the following Term, but not before, nor will defendant be intitled to an imparlance. For the defendant is never intitled to an imparlance where the plaintiff is prevented from declaring before the Essoin Day, by an essoin cast. *Rooke v. the Earl of Leicesters*. 2 D. & E. 16.

Of proceedings on an essoin, and delivering declaration.

It is observable, that agreeable to the old practice, some one of the judges of the respective courts, do still continue to go down to Westminster on the Essoin Day of each Term, in order to open the courts, and to take essoins, should any be offered; though they do not sit for dispatch of business till the *Quarto Die post*.

The modern practice of opening the courts on the Essoin Day.

For the respective Essoin Days preceding the respective Terms, see the Table of Terms and Returns hereunto annexed.—But there are also other Essoin Days in the

The different essoins.

THE DAY OF EXCEPTION. [15]

Terms, as many as there are return days. But by the Effoin Day, generally speaking, is to be understood, the first Effoin Day in each Term.

Effoin day first day of Term in law.

The Effoin Day is, in law, the first day of Term, the Quarto Die post being merely a day of grace. *Walter's case.* 1 Bul. 35.

When judgments relate thereto.

Judgments relate, therefore, to the Effoin Day. *Ib.* But that is, if the proceedings were by *original*; if by *bill*, to the *Quarto Die post*.

A judgment of Hilary Term had precedence to a statute acknowledged between the Effoin Day and the *Quarto Die post*. *Stanford v. Cooper.* Cro. Car. 102.

But if the Effoin Day happen to be *Sunday*, the judgment can only relate to the first judicial day. *Davis v. Salter.* Sal. 627.

A writ well sued out between Effoin Day and Quarto Die post

A writ pleaded as sued out on a day, between the Effoin Day and Quarto Die post, held good on demurrer; for though the court do not in fact sit till the *Quarto Die post*, yet in law the Effoin Day is considered as the first day in Term. *Belk v. Broadbent.* 3 D. & E. 184.

(B 2.)

(B 2.) *The Day of Exception.*

Of the Day of Exceptions.

Of this day, sufficient explanation has been already given. It being nothing more than the day next after the Effoin Day, when the demandant or plaintiff might enter his *Exception*, and obtain an order called a *Ne Recipiatur*, that the tenant's or defendant's effoin or excuse should not be received, in case such effoin had not been put in, in due time, on the Effoin Day.

Of the *Ne Recipiatur*.

This *ne recipiatur* may still be entered at the Clerk of the Effoins, in all real and other actions, in which effoins are allowed.

(B 3.)

(B 3.) *The Day of the Return of Writs, or, Reterna Brevium Day.*

How returns regulated formerly.

It has been before observed, that writs were returnable at certain stated days in different seasons of the year: but it does not appear, that there was any precise rule requiring a writ to be returnable at any one of these stated

stated days in preference to another. There seems, however, to have been some difference in the early times of our law, between the length of time allowed to persons summoned, to appear in. In a law of one of our Saxon kings (Ethered), it is directed, that if the party dwelt one county off, he should have one week; if two counties, two weeks; and so for every county a week. The same is laid down by a law of Henry I. with a restriction not to go beyond the fourth week, *ubicunque fuerit in Anglia*; but if the party was beyond sea, he might have six weeks. There is no intimation, either in Glanville or Bracton, of any such rule prevailing in their times. It is probable, that the returns in the time of the latter might nearly correspond with the scheme laid down by the stat. of *Dies Communes in Banco*, which passed in the 51st year of Henry III. But this act does not give us entire satisfaction on that head; for being only a direction to the justices in Banco how to fix the returns of process which they issued, in consequence of the return of some other writ; we are still uninformed as to the rule that governed in the return that was to be affixed to original writs. These we know might be obtained in the office of the Chancery any day in the year. Whether they were made returnable at the pleasure of the clerks who penned them, or, as is more probable, at the option of the purchaser; or whether a certain rule subsisted in the Chancery-office on this head, we are not able to collect. When the original, however, was once returned in Banco, the rule for making the return of process upon it, and process upon that process, was prescribed by the stat. of *Dies Communes in Banco*.

a Reeve, 56.

Of the stat. of
Dies Communes
in Banco.

The ancient mode therefore, of regulating the precise returns of original writs, is hidden in obscurity; and the assertion to be found in many books, and, among others, in Black. Comm. vol. 3. p. 277. that the returns of original writs "were certainly settled as early as the stat. 51 H. 3. st. 2." meaning the statute of *Dies Communes in Banco*, is erroneous; since that statute has nothing to do with the return of the original writ, but only settles the returns of the future process, founded upon such original writ after the original writ itself had been returned.

The uncertainty
of the ancient
practice.

Since the statute of *Dies Communes in Banco*, other statutes have been made relating to the returns of the respective Terms, particularly the statutes of 16 Car. 1.

Returns regu-
lated by subse-
quent statutes.

c. 6.

c. 6. and 24 G. 2. c. 48. regulating the returns of Michaelmas Term, and 12 H. 8. c. 21. regulating the returns of Trinity Term.

Observations
upon the Re-
turns, as now
settled.

As it is intended to treat hereafter more at large of the teste and return of writs, it may be sufficient at present, to add a few general observations on the subject.

Dies in Banco,
what.

In every Term, then, there are stated days, called days in bank, *Dies in Banco*, upon some of which, all original writs must be made returnable; they are therefore called the *General Returns* of that Term. They are at the distance of about a week from each other, and have reference to some Saint-day or festival, near which they fall. These returns are frequently inserted in the almanacks, and may be seen in the table hereto subjoined. But it is to be observed, that only *original* writs, and such other writs as are grounded upon them, are to be made returnable on these *general* return days; and as, in many cases, it is now usual not to sue by *original*, but by *bill* or attachment of privilege, as will be presently shewn, there are other return days, called *particular* return days, on which all other writs, except originals, or those founded upon them, may be returned.

General Re-
turns, what.

Particular Re-
turns.

These particular returns may be made on any day in the Term, except Sundays, and a few other days, called *Dies non Juridici* (for which see post C); they express the particular day in the process, and bear reference to the general return day immediately preceding, and are said, therefore, to be made returnable on a day *certain*.

When, and how
used.

As for instance, The general returns of Michaelmas Term, are on the morrow of All Souls, on the morrow of Saint Martin, and so on. Now, if the plaintiff sue by original writ out of Chancery, or by any writ grounded thereon, such writ must be made returnable on *the morrow of All Souls*, or one of these *general* return days, agreeable to the time when it was sued out. But if he sue by bill, or attachment of privilege, he must make it returnable on some *particular* day, or day *certain*; as on *Monday*, or *Tuesday*, or *Wednesday*, next after the morrow of All Souls, or after the morrow of Saint Martin, or the like, as the case may be.

Indeed, a *general* return day may be made a *particular* return day, and process, by bill, &c. be returnable there-
on;

on; as thus: "On *Tuesday*, the morrow of All Souls," (by mentioning the day of the week,) which may sometimes be expedient to gain time.

This rule of making writs and process returnable, according to the nature thereof, upon general or particular return days, must be strictly attended to in both courts.

The writs which must be made returnable on a *general* return day, are

What writs should be returnable in both courts on general return days.

In B. R.

All writs of *capias*, *alias*, and *pluries*, grounded upon *originals* out of Chancery, and all writs subsequent thereto, to the outlawry. Writs of *scire facias quare executionem non, et ad audiendum errores*, upon writs of error out of the Common Pleas, or other inferior courts; writs of *capias ad satisfaciendum, fieri facias*, and other judicial writs, after judgment affirmed. Writs *De Return habend*, *Capias in Wiltshire*, and all other writs and process grounded upon any *recordari facias loquelam, audita querela, accedas ad curiam, capias si laicus*, and every other judicial writ out of Chancery.

In C. B.

All writs of *capias*, and other writs issuing out of this court, grounded on original writs out of Chancery. For which reason, the writs in this court are, for the most part, returnable on *general* returns. Their common process, by *capias ad respond.* being founded on an original writ out of Chancery, as will be shewn hereafter. But it is *otherwise* in proceedings by, or against, the officers of the court, as by *attachment* or *bill*.

N. B. In the King's Bench, whenever a writ is made returnable on a general return day, it should also be with an "*ubicunque*," as it is called; that is, instead of making it returnable on that day at *Westminster*, it should say, "*wheresoever we shall then be in England*;" as "on the morrow of All Souls, wheresoever, &c." For that court is removeable with the king at his pleasure. [Appendix A.] But in the Common Pleas it is otherwise, and the writ is made returnable before the king's justices at *Westminster*, that court being fixed by Magna Charta, and not removeable without previous notice given, agreeable to 2 Edw. 3. c. 11. [Appendix A.]

In B. R. General Returns should be *wheresoever, &c.*

[Appendix A.]

In all original writs, there should be fifteen days at least between the *teste* and *return*.

In original writs, 15 days between *teste* and *return*.

Formerly

Except in certain cases,

Formerly it was necessary that there should be 15 days between the teste and return of all writs in the *course* of the cause, even of the writs in *execution*, if the action had been commenced by *original*. But as that occasioned great delay, it was enacted by 13 Car. 2. st. 2. c. 2. § 6. that in all actions of *debt*, and all other *personal* actions, and also in all *ejectments*, after any *issue* therein joined, or any *judgment* obtained, in either of the courts, there need not be 15 days between the teste and return of any writ of *venire facias*, *hab. corp. jurat*; or, *distring. jurat*, *fi. fa.* or, *ca. fa.* Nor shall the want thereof be assigned for error. But this statute does not extend to any *ca. fa.* whereon a writ of *exigent* after judgment is to be awarded, nor to any *ca. fa.* against defendant in order to make bail liable.

What writs returnable on particular returns or days certain.

The writs which must be made returnable, on a *particular* return day, or a day *certain* in Term, are,

In B. R.

All bills of Middlesex, *latitats*, alias *capias*, *pluries capias*, and all other writs, when the original proceeding was by *bill*; also *habeas corpus super cepi corpus*; *hab. corp. ad faciend. et recipiend.* and all other proceedings thereupon, both before and after judgment.

In C. B.

All writs of *attachment*, and writs subsequent thereto, and writs grounded on *bills*, filed against attornies, and such officers of the court, as are entitled to the privilege of the court; as also against members of the house of commons, and writs of *habeas corpora*, and the proceedings thereon.

May be returnable on general return days, if not Sunday.

These *particular* returns may be made, as before observed, even on the *esoin* days, or general returns, by specifying the *particular* day of the week, and so making the return on a day *certain*. But if the *esoin* happens on a Sunday, the writ must be returnable on *Monday* next after, &c.

(B 4.)

(B 4.) *The Day of Appearance.*

Of the Appearance Day.

Of the Day of Appearance, or *Quarto Die post*, sufficient has been said above for the present. (See ante B.) It is a day of favour or indulgence granted to the defendant to appear in, even four days after he has been summoned so to do, and one day after the writ has been returned by the sheriff, and the court have therefore got possession of the cause. This practice seems to have originated from the feudal law, which always allowed three

three distinct days of citation before the defendant was adjudged contumacious for not appearing. The proceedings, in case of defendant's appearance, or of his default, will be shewn in the body of the work.

C. Of such Days as are not juridical, or, DIES NON JURIDICI. C.

THERE are certain days in the Terms, called *Dies non Juridici*, on which care must be taken that no writ be made returnable. Such is the *Feast of the Purification* in Hilary Term, *Ascension Day* in Easter Term, and the *Feast of St. John the Baptist*, if it happen in Trinity Term (unless it be the first day of that Term, namely, the Friday after Trinity Sunday, for then it is made *Dies Juridicus*, by stat. 32 H. 8. c. 21). Purification.
Ascension Day.
St. John Baptist.

Writs returnable on any of those days would be void. So that if a writ be returnable on a *Dies non Juridicus*, on which it cannot legally be executed, it shall not be executed the next day, but is void; and if it be executed, and a writ of error brought on the proceedings, they shall be set aside. *Harvey v. Broad.* 6 Mod. 148. 196. Writs if returnable thereon, void.

Sunday is *Dies non Juridicus*. *Davy v. Salter.* 6 Mod. 252. Sunday.

The award of any judicial process upon a Sunday is void. *Sir W. Jon.* 156. So the entry of any judgment upon record. *Ib.* So if judgment be given upon a Sunday in an inferior court. *Page v. Fauvet.* Cro. Eliz. 227. What may or may not be done on Sunday.

So the return of a writ by the sheriff. *Harvey v. Broad.* 6 Mod. 148. 196.

And the courts will take notice of this mistake, though it does not appear upon the record, but they are only told of it, *ore tenus*. *Ib.* How the courts will notice that day.

For the almanack is part of the law of the land. 6 Mod. 41. And the court must take judicial notice of the commencement and return days of all Terms. *Davy v. Salter,* 6 Mod. 250. And attend to the almanack.

By

No process executed on Sunday.

By the stat. 29 Car. 2. c. 7. if any person serve, or execute process, warrant, order, judgment, or decree, on a Sunday, (except for treason, felony, or breach of the peace,) it shall be void to all intents, as if done without process or warrant.

No arrest made.

For an arrest therefore on a Sunday, false imprisonment lies. *Wilson v. Tucker.* 8al. 78.

But the person arrested must resort to his action, for the court will not, on motion, discharge him. *Ib. Wilson v. Guttery.* 5 Mod. 95.

What might be done before the stat.

Before the stat. 29 Car. 2. all ministerial acts upon a Sunday, were lawful, though not judicial ones; as an arrest by an officer upon process. *Machally's case.* 9 Co. 66. 2 Cro. 280. *Pitt v. Weblay.* 2 Bul. 72.

But Q. taking a person in execution. Godb. 280. *Wait's case.* A person may now be taken in execution on any day but Sunday.

What criminal proceedings allowed.

By the above stat. 29 Car. 2. execution of process, warrant, &c. in cases of treason, felony, or breach of the peace, is allowed.

Execution of justice's warrant.

Within this exception, execution of a warrant of a justice of peace for good behaviour, is lawful. *Johnson v. Colson,* T. Ray. 250. But before the statute, it was held otherwise. *Prinfor's case.* Cro. Car. 602.

A retaking on an escape.

If a defendant, arrested on a Saturday, escapes, he may be retaken upon the Sunday, for that is not an execution of process, but a continuance of the former imprisonment. *Jacob v. Dallow.* 6 Mod. 231.

Bail seizing principal.

But not if the escape be voluntary. Bar. 373.

Escape warrant executed.

So a person may be taken upon an escape warrant on that day. *Parker v. Sir W. Moore.* 6 Mod. 95.

An arrest on the Chancellor's warrants.

A person may be arrested on Sunday on the Lord Chancellor's warrant, on an order of commitment for contempt, for he is considered as in custody from the time of making the order; and the warrant is directed to the gaoler, and is in the nature of an escape warrant. 3 Atk. 55. *ex parte Whitechurch.*

D.] DIES NON JURIDICI.

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On that day a person may surrender voluntarily. *Ib.* A voluntary surrender.

Process on an indictment and attachment for a contempt, may be served. *Ib.* Process on indictment or attachment served.

A man may be taken on an attachment for non-performance of an award. *Ib.* The party taken thereon.

A proclamation upon summons may be made, according to the statute 31 Eliz. 3. *Anon.* 5 Mod. 449. Proclamation on summons.

A citation out of the Spiritual Court may be published at the door of the church, according to the usage of the court, though it cannot be served upon the person. *Semb.* 5 Mod. 450. *Alanson v. Brookbank.* Carth. 504. Citation out of Spiritual Court published.

So Hue and Cry may be made upon a Sunday. *Wait's case.* Godb. 280. Hue and Cry may be made.

And if the Hundred refuse to make it, they shall be punished for the neglect. *Ib.*

On the 29th May, Restoration Day, business is not usually done, and only one judge, in general, attends; but business may be done on that day, and in East. 7 G. 3. it being the *last common paper day*, the one judge went through the paper, otherwise the parties could not have had their judgments within that term. 4 Bur. 2089. Restoration Day, how far Dies non, &c.

D. The Practice of prosecuting and defending Suits by Attorney.

D.

FORMERLY, actions were prosecuted and defended by the plaintiff and defendant in *person*; they themselves appeared in court to make and plead to the charge, or demand, which was the object of the suit; nor was it allowable (except in particular cases) to appoint an attorney. The modern practice is quite otherwise; the appointment of attorneys is now generally allowed; actions are, for the most part, conducted by them on behalf of the parties; and it would be looked upon as extremely singular

The ancient practice of suing and appearing in person.

singular for any person (not being an attorney,) to prosecute, or defend his own suit; though any one is still at liberty so to do, there being no law, however custom may be, to the contrary.

Such a total difference between the modern and ancient practice, may at first appear not a little remarkable; it may therefore be deemed neither useless nor unsatisfactory, briefly to explain the origin and reason of the present prevailing practice of appointing attorneys; how they were, and still ought to be, appointed; and what is now necessary for them to do as evidence of such their appointment, which will lead to the consideration of the memorandum or minute of the warrant of attorney directed to be filed by the late statute of 25 G. 3. c. 80.

(D 1.) (D 1.) *The Origin of the prevailing Practice of prosecuting and defending by Attorney.*

The parties formerly appeared in person.

By the policy of the common law, says Lord Coke, that suits might not increase and multiply, *cum lites potius restringenda sunt quam laxanda*, both plaintiff and defendant, or demandant and tenant, in all actions, whether real, personal, or mixed, appeared in person, as well in courts of record, as not of record, by reason whereof, he adds, *there were but few suits.* 1 Inst. 128. 2 Inst. 249.

Unless the king, by writ, or letters patent, authorized an attorney.

But the king, by his prerogative, might have authorized either party to appoint an attorney, which was done by a certain special warrant, called a *dedimus potestatem de attorney faciendo*; and if the judges refused to admit such person, by his attorney, the writ *de attorney recipiendo* was sued out to compel them so to do. F. N. B. 59. 367.

Responsalis what, and the difference between them and Attornies.

In particular cases, also, the justices might suffer a deputy, or agent, to prosecute or defend the suit for the parties concerned; but this deputy was not called *attornatus*, or an attorney; but a *responsalis*. The latter differed from the former, both in the mode of appointment, and in the extent of authority. The *attornatus*, or attorney, was appointed by virtue of the king's warrant or writ;

writ; and that, instantly upon, or (if for the plaintiff) even before, the commencement of the suit. The *responsalis* was appointed by the justices in open court, not until the suit was commenced, and the party had appeared, for it was necessary that the person appointing such *responsalis*, should be *present*, and make the appointment before the justices in open court. 1 Reeve, 169.

Again, the *attornatus*, or attorney, might be appointed with a *general* authority to act for the party in other suits and matters; but the *responsalis* was confined to the *particular* cause then pending. It is clear, therefore, that the *attornatus* and *responsalis* were very distinct in their natures; although it is too common an error to confound them, and to make them synonymous.

Lord Coke, however, endeavours to guard his reader against this mistake. It appears, says he, in Glanville's time, that the justices admitted the parties *per responsalem loco suo ad lucrandum vel perdendum, verum oportet eum esse PRESENTEM in curia qui responsalem ita in loco suo ponit. Et nota DIFFERENTIAM inter responsalem & attornatum.* 2 Inst. 249. 1 Inst. 128.

In process of time, the rigour of the common law, with respect to the personal appearance of the parties to a suit, gradually abated; and so early as the 13 Edw. I. an act passed, authorizing persons, in certain cases, to appoint attorneys; which act has, for the most part, been looked upon as the foundation of the prevailing practice of suing and defending by attorney, and as giving *every person* a liberty of appearing, and appointing an attorney. Gilb. C. B. p. 33. 2 Inst. 378. 2 Reeve, 169.

At what period attorneys were more generally introduced.

But this was clearly not the case; since by subsequent statutes, 7 R. 2. c. 14. & 15 H. 6. c. 7. this privilege was further extended to other persons mentioned therein; and it was not until even the 29 Eliz. c. 5. that the liberty of appearing by attorney was extended to defendants in penal suits.

It seems clear, however, that from about that period, namely, the 13 Edw. 1. it became the practice to prosecute and defend suits by attorney; that is to say, by a deputy or agent; an attorney, strictly defined, meaning
C only

only a person set in the place of another; accordingly, the language of the warrant is—" *Talis loco suo ponit talem attornatum.*"—By the statutes thus authorizing the appointing of attornies, with a general power, the *responsalis* became of no further use.

The consequence of the introduction.

The natural consequence of this general introduction of attornies was, their rapid increase, together with a multiplication of suits.

When the statutes, says Lord Coke, gave way to appear by attorney, it is not credible how, with attornies and their multiplication, suits in law, for the most part unnecessary, and for trifling causes (when the parties themselves might sit quiet at home) increased and multiplied. So dangerous, and such ill success have ever had the breach of the maxims and ancient rules of the common law. 2 Inst. 249.

So great, indeed, were the inconveniences found to result from this rapid increase of attornies, that the legislature, at different times, hath interfered; and, by an act of parliament passed in the 33 H. 6: we find their number in Norfolk, Suffolk, and Norwich, actually limited, to six in Norfolk, six in Suffolk, and two in Norwich.

Who may now appoint an attorney.

At present, however, the number of attornies is unlimited; and any person may appoint an attorney to prosecute or defend a suit for him, except such persons as, by reason of infancy, coverture, or the like, are not supposed to have sufficient legal discretion to make such an appointment.

This evidently shews, that formerly there was a regular formal method of appointing an attorney, and which, indeed, ought still to be observed.

Which leads to the consideration of

(D 2.)

(D 2.) *The Warrant of Attorney to prosecute and defend.*

When the legislature allowed any person, at his discretion, to prosecute, or appear and plead, by attorney, nothing remained, when an action was about to be brought,

D.] THE WARRANT OF ATTORNEY.

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brought, or defended by any one, than the appointing of an attorney for the conducting thereof; which appointment was made by a certain written warrant, authorizing such a person, as an attorney, to prosecute or defend the said suit, for, and on the behalf of such plaintiff or defendant.

Of the warrant of attorney to prosecute and defend.

This warrant unquestionably answered many good purposes:—To the court, it was evidence of the authority of the attorney employed;—to the attorney, it was a voucher of his appointment, and of itself a retainer by his client;—to the subject, in general, it was a beneficial check to the bringing or carrying on of suits in persons names without their privity or consent.

Its uses.

That the legislature was aware of the use and importance of these warrants, clearly appears by a statute so early as the 18 Hen. 6. c. 9. where every attorney was subjected to the penalty of 40*s.* who had not his warrant entered of record in all suits wherein process of *outlawry* was awardable, the same term in which the *exigent* was awarded.

Of filing the same of record.

By various other statutes, from time to time passed, as 32 H. 8. c. 30. f. 2.—18 Eliz. c. 14.—and 4 Ann. c. 16. particular times were appointed for the filing of these warrants, and penalties inflicted in default thereof.

By the last of the above statutes, the plaintiff's attorney should file his warrant the same Term in which he declares, and the defendant's attorney the same Term in which he appears; and for neglecting so to do, the attorney is liable to the forfeiture of 10*l.*

When to be filed.

Forfeiture on default.

But, although such neglect subjects the attorney to a penalty, yet, with respect to the validity of the proceedings, it is sufficient, if the warrant be filed any time *pendente lite*, (i. e.) before final judgment. *Dyke v. Sweeting*, 1 Will. 181. Or, even after judgment, and error brought. *Vincent v. Bodurdo*, 2 Keb. 199.

But proceedings not invalid.

But by the statute of Jeofails, 18 Eliz. c. 14. the want of a warrant is aided after verdict; though, in case of judgment by default, it seems still necessary. 4 Ann. c. 16.

Want of warrant when aided.

C. 2

The

The practice of appointing by warrant now disused.

The practice, however, not only of filing, but even of taking these warrants of attorney, is at this day, for the most part, disused.

Perhaps it would be better otherwise.

A mere parol retainer is deemed sufficient. But perhaps it might be better, and safer, if the old practice in this respect were more strictly attended to, and greater caution used by attornies in procuring a proper authority before they proceed; for, even if a forged power of attorney be imposed upon them, they are responsible for any thing they may do under it, however innocently.

Attornies answerable if they trust even to a forged power of attorney, though innocently. They should therefore be cautious.

In the case of *Robson and Eaton*, 1 D. & E. 59. the fact was, that one Davis, having procured a forged power of attorney, went to Hodgson, and commissioned him to bring an action in C. B. against Eaton, at the suit of Robson. He did so, perfectly innocent of the fraud; and defendant, the action being in plaintiff's name, and seeing upon the record that William Hodgson was the attorney put in by plaintiff, paid the money into court, which Hodgson took out, and paid it over to Davis, who had not been heard of since; after which, this action was brought by the plaintiff himself for the original debt due. Per Lord Mansfield. There can be no doubt upon this case. The attorney, who trusted to the warrant of attorney, is liable; and Davis, who committed the forgery, is liable to him. Judgment for plaintiff.

So should the parties also.

This shews, also, the necessity of caution on the part of the defendant himself; and that it is always advisable to be satisfied, that the action is, in fact, brought at the instance of the real plaintiff; for, suppose the attorney, in the above case, had not been a responsible person, Eaton, the defendant, must have submitted to the loss.

But although no regular warrants may be, at this day, either taken or filed of record by attornies, (though strictly speaking, by the laws still in force they ought to be,) yet, by a late statute, subjecting every such warrant to a stamp duty, attornies are now enjoined to file a *memorandum* or *minute* of such warrant of attorney, at the particular times, and in the manner mentioned therein;

D.] MEMORANDUM OF WARRANT, &c.

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therein; as will be more fully explained in the treating of the

(D 3.) *Memorandum, or Minute of the Warrant, to prosecute or defend.*

(D 3.)

By the 25 G. 3. c. 80. f. 1. every warrant given to any attorney to commence, carry on, or defend any suit where the cause of action shall be above 40s. shall be charged with a stamp duty of 2s. 6d.

25 G. 3. c. 80.
Every warrant
to have a 2s. 6d.
stamp.

And in order (as the act expresses it) to make suitable provisions for the payment of this duty, it is, by sect. 13. enacted, That no attorney shall sue out any writ or process, or commence or prosecute, or shall defend any suit, or appear for any defendant in any action, (for, or in expectation of any gain, fee, or reward,) by virtue of any warrant or authority whatsoever, whether verbal or written, unless such attorney shall have delivered a memorandum, or minute, to the proper officer, or his deputy thereby appointed to receive the same, duly stamped with a 2s. 6d. stamp, of such warrant or authority containing the names of the respective parties to the suit, the court in which the same shall be commenced, and also the name of the attorney or agent immediately retained to prosecute, carry on, or defend the same (agreeable to the form therein, and hereinafter prescribed), which memorandum is to be entered, or filed of record, as hereinafter mentioned.

Every attorney
prosecuting or
defending a suit,
to deliver such
stamped warrant

By sec. 15. the proper officers, to whom the attorneys are to deliver these stamped memorandums, and by whom they are to be duly filed, are on the part of the plaintiff's attorney, the clerk, or person who signs the writ, or first process, and on the part of the defendant's attorney, the clerk, or officer who files the bail, or enters the appearance for defendant; and if bail be put in before a judge, then the memorandum is to be delivered to the judge's clerk before whom such bail is put in.

to the officers
to whom they
have occasion
first to apply in
the prosecuting
or defending the
suit.

(S. 21.) If plaintiff file common bail, or enter an appearance for defendant according to the statute, he may do so without entering, or filing of record, any memorandum or minute for the defendant.

No such memo-
randum on ap-
pearing for de-
fendant, accord-
ing to statute.

Except further proceedings taken by defendant.

But no attorney shall, after such appearance entered, according to the statute, carry on any further proceedings for such defendant, until the memorandum, or minute of the warrant, duly stamped, be delivered to the proper officer. S. 22.

If a new defendant added, no new memorandum necessary.

S. 24. If a new defendant, by any rule or order of the court, be added to a suit after the action be commenced, no new memorandum or minute is necessary upon the suing out of process against such defendant.

Memorandum necessary where judgment by default.

S. 19. If any defendant, before appearance, shall confess any action, or suffer judgment by default, a memorandum or minute of such *cognovit* or warrant of attorney, must be delivered to the proper officer, previous to entering up judgment.

Want thereof not to vitiate proceedings.

S. 17. Any omission, or defect in the entering, or filing of the memorandum or minute, does not vitiate the proceedings.

But attorneys forfeit 5l.

S. 16. But the attorney, not conforming to the act, is subject to a penalty of 5l.

Officers not filing same, forfeit 50l.

S. 15. And if the respective clerks, or officers, who receive the memorandums or minutes, do not pursue the directions in the statute, they are liable to a penalty of 50l.

This duty not to be charged by attorneys.

S. 20. None of these duties to be charged by the attorney to his client; nor inserted, under any pretence, in the attorney's bill.

But agents may charge them to attorneys.

S. 21. But agents may charge them to the attorneys who immediately employ them.

It is, by this same act, 25 G. 3. c. 80.,

Attorneys to take out certificates every year.

That attorneys are compelled to take out a certificate every year, to enable them to act as such attorney; or, in default thereof, are liable to a penalty of 50l. which, if they live in London, Westminster, within the bills, or in Edinburgh, is subject to a stamp duty of 5l.—if they live elsewhere, to 3l.

Form of the memorandum or minute.

The form of the memorandum, or minute to sue or defend, to be entered in the respective courts, or filed

D.] MEMORANDUM OF WARRANT, &c.

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of record, as prescribed in the schedule to the above act, is as follows :

In the court of (insert the name of the For plaintiff.
court in which the proceedings are to be carried on) in
England (or Scotland, or Wales, &c. as the case may
be).

Middlesex to wit. A. B. is retained to prosecute
by C. D. as his attorney, against E. F. (or otherwise as
the case may be.)

A. B. plaintiff's attorney.

(If by an agent to the attorney immediately retained,
add,)

By G. H. his agent.

Entered, or filed of record,
(As the case may require) this day of
in the year of the reign of
(Officer's name.)

The like form for the defendant's attorney (*mutatis For defendant.
mutandis*).

In the court of (insert the name of the
court as before)

Middlesex to wit. I. K. is retained to defend by
E. F. as his attorney, at the suit of A. B.

I. K. defendant's attorney.

(If by an agent, add,)

By L. M. his agent.

Entered, or filed of record, this day of
in the year of the reign of
(Officer's name.)

N. B. These forms are printed, and may be had at
the stationers, or of the officers to whom they are to be
delivered, and who generally keep some by them, for
which is paid, 2s. 7d.

The last words, "Entered, &c." are written, or
filled up by the officer whose duty it is to receive the
memorandum, and file the same; so that the former part
only is necessary to be written or filled up by the attor-
ney.

TABLE OF TERMS AND

Thus have we considered (and from the length of the act of parliament, 25 G. 3. necessary to be stated) as briefly as the subject would allow, the nature and origin of the prosecuting and defending by attorney, the mode of appointment by warrant, (which of late years seems to have fallen into disuse,) and the memorandum, or minute of the warrant or authority to prosecute or defend, requisite to be filed.

As the above remarks equally apply to all actions, whether bailable or not bailable, and relate as well to the proceedings at the commencement of a suit, as in other parts thereof; and as frequent occasions will arise, in the course of the work, to refer thereto, it was thought proper to throw them into a detached head, and to introduce them in this place, among other general introductory observations.

A T A B L E

OF THE

TERMS and RETURNS in B. R. and C. B.

MICHAELMAS TERM

Contains three Weeks and two Days, and hath four Returns.

It begins on the 6th of November, if not Sunday, otherwise the 7th, and ends on the 28th of November, if not Sunday, otherwise the 29th.

The 3d of November is the *Effoin* Day of this Term.

For the regulation of this Term, vide statutes 16 Car. 1. c. 6.—24 G. 2. c. 48.

BY ORIGINAL.

* Anyday in the week that plaintiff wishes writ to be returnable, except Sunday.

1. On the Morrow of All Souls.
2. On the Morrow of Saint Martin.
3. In 8 days of Saint Martin.
4. In 15 days of Saint Martin.

BY ATTACHMENT OF PRIVILEGE, BILL, &c.

1. On (*) next after the Morrow of All Souls.
2. On () next after the Morrow of Saint Martin.
3. On () next after 8 days of Saint Martin.
4. On () next after 15 days of Saint Martin.

If a *latitat* or *bill of Middlesex* be made returnable in this Term on *Saint Martin's day*, which may be done, it must be thus, on "Tuesday the Feast of St. Martin," specifying the day on which the Feast of Saint Martin happens to fall.

HILARY

RETURNS IN B. R. AND C. B.

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HILARY TERM

Contains three Weeks, and hath four Returns.

It begins the 23d January, if not Sunday, otherwise the 24th, and ends 12th of February, if not Sunday, otherwise the 13th.

The 20th of January is the *Effoin* day of this Term.

In the Exchequer, it begins eight days before the full Term in other courts.

BY ORIGINAL.

1. In 8 days of Saint Hilary.
2. In 15 days of St. Hilary.
3. On the Morrow of the Purification.
4. In 8 days of the Purification.

BY ATTACHMENT, BILL, &c.

1. On () next after 8 days of Saint Hilary.
2. On () next after 15 days of Saint Hilary.
3. On () next after the Morrow of the Purification.
4. On () next after 8 days of the Purification.

Writs must not be made returnable on the 2d day of February in this Term, it being a *Dies non Juridicus*.—This is an *issuable* Term.

EASTER TERM

Contains three Weeks and six Days, and hath five Returns.

It begins the Wednesday fortnight after Easter-day, and ends on Monday before Whitsunday.

The Sunday next preceding the Wednesday fortnight after Easter-day, is the *Effoin* Day of this Term, which, falling on a Sunday, is held on the Monday.

In the Exchequer, it begins eight days before full Term in the other courts.

BY ORIGINAL.

1. In 15 days of Easter.
2. In 3 weeks (a) of Easter.
3. In 1 month (a) of Easter.
4. In 5 weeks from Easter Day.
5. On the Morrow of the Ascension.

BY ATTACHMENT, BILL, &c.

1. On () next after 15 days of Easter.
2. On () next after 3 weeks from the day of Easter.
3. On () next after one month from the day of Easter.
4. On () next after 5 weeks from the day of Easter.
5. On () next after the Morrow of the Ascension.

Writs must not be made returnable on *Ascension Day* in this Term, it being *Dies non Juridicus*.

(a) In B. R. in these two Returns, it is usual to say *after Easter*, and not *of Easter*. All the other Returns are the same in both courts.

TRINITY

TRINITY TERM

Contains twenty Days, and hath four Returns.

It begins the Friday after Trinity Sunday, and ends on the Wednesday fortnight after it begins, unless that day happens to be the 24th of June, and then on the day following.

The Monday next preceding the Friday after Trinity Sunday, is the *Effrin* Day of this Term.

In the Exchequer, it begins four days before full Term in the other courts.

For the regulation of this Term, vide Statutes 51 H. 3. st. 2. and 12 H. 8. c. 21.

BY ORIGINAL.

BY ATTACHMENT, BILL, &c.

- | | |
|---------------------------------------|--|
| 1. On the Morrow of the Holy Trinity. | 1. On () next after the Morrow of the Holy Trinity. |
| 2. In 8 days of the Holy Trinity. | 2. On () next after 8 days of the Holy Trinity. |
| 3. In 15 days of the Holy Trinity. | 3. On () next after 15 days of the Holy Trinity. |
| 4. In 3 weeks after the Holy Trinity. | 4. On () next after 3 weeks of the Holy Trinity. |

Writs must not be made returnable on the 24th June (*Midsummer Day*) if it falls in this Term, unless it happen to be the Friday next after Trinity Sunday, then they may by stat. 32 H. 8. c. 21.

This is an *Usable* Term.

N. B. Upon all days in Term (except Sundays, and such as are deemed *Dies non Juridici*, which are specified in the above Table) writs may be made returnable. If *original* writs, or founded on such, then on one of the *general* Return Days: if by *bill*, attachment, or the like, then on a *particular* day in the week immediately referring to the last general Return Day, in manner above-mentioned. But see ante, B 3.

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A
D I G E S T
OF THE
RULES and CASES of Practice
IN THE COURTS OF
King's Bench and Common Pleas.

CHAP. I.

Of the several Ways of bringing Actions in the
Courts of King's Bench and Common Pleas.

(A) In the Court of King's Bench.

(A 1.) *In common Cases.*

1. *By Bill.*
2. *By Special Original.*

(A 2.) *In particular Cases.*

1. *By Bill against Attornies, Prisoners, Peers, &c.*
2. *By Attachment of Privilege.*

(B) In the Court of Common Pleas.

(B 1.) *In common Cases.*

1. *By Original and Capias.*
2. *By Original Quare claus. freg. and Summons.*

(B 2.) *In particular Cases.*

1. *By Bill against Attornies, Peers, &c.*
2. *By Attachment of Privilege, &c.*

AN ACTION is defined differently by different writers: It is said, by Bracton and Fleta, to be *Nihil aliud quam jus prosequendi in judicio quod sibi debetur.* By Lord C. J. Coke (Co. Litt. 285.) it is called,

"A legal

An action
what.

"A legal demand of one's right." By another learned author (3 Black. Com. 116, 117.) it appears to be considered as "a remedial instrument of justice, whereby redress is obtained for any wrong committed, or right withheld." But, more immediately to answer our present purpose, it may not, perhaps, be improperly defined, "*The method prescribed by different statutes, and by the rules and practice of the respective courts for the recovery of any debt due, or of an equivalent in damages for any injury sustained.*"

How to be brought.

The first question which naturally suggests itself, is, What is the *method so prescribed*? In what way is this legal mode of redress, called an *action*, to be enforced? Which leads to the consideration of the several ways of bringing actions in the respective courts.

(3 In B. R.) Q. Of the several Ways of bringing an Action in the Court of King's Bench.

(A 1.)

(A 1.) *In all common Cases.*

1. *By Bill.*
2. *By Special Original.*

What meant by common cases.

By *common Cases*, is to be here understood, all such actions as are brought by one common person against another, where the defendant is not a prisoner in the *actual* custody of the court.

It is well known, that the present usual method in such cases of commencing a suit in the Court of King's Bench, is, either by *bill of Middlesex*, or *latitat*.

But the *bill of Middlesex* and *latitat*, strictly speaking, are nothing more than *process* to bring the party into court, founded upon a certain *plaint*, called a *bill*, *supposed* to have been previously filed by the plaintiff. For which reason this mode of proceeding is termed, BY BILL.

1st, Of proceedings by bill.

As this *bill*, which, for distinction's sake, we will call the *original bill*, is not, in point of fact, now filed, but the process of the *bill of Middlesex* is sued out, in the first instance; the *former* is too often confounded with the *latter*; or sometimes it is as erroneously mistaken for

Mistaken for other bills.

for the same kind of *bill* with that filed in proceedings against attornies and prisoners.

To prevent, therefore, any such misconceptions, and to assist the reader in the better understanding of the practice of this court, we will endeavour, in as few words as the nature of the subject will admit, to explain this *general mode of proceeding BY BILL in common cases.*

An explanation thereof.

The Court of King's Bench had always, from its first establishment, an *original* jurisdiction over *criminal* offences, or pleas of the crown; and also over such *civil* matters as were in breach of the peace, and therefore denominated, *trespasses*. [Appendix A and B.]

[Appendix A. and B.]

It also necessarily possessed a mode of proceeding peculiar to itself, as incidental to such original jurisdiction: which mode of proceeding was by *bill*. And as this jurisdiction at first extended only to such civil matters as were deemed *trespasses*, it was necessary that this *bill* should alledge, generally, a *trespass* to have been committed by defendant. It has, therefore, sometimes been called, and not improperly, the bill in *trespass*. (1stid's Pract.)

Called the bill in trespass.

By specious contrivances, and subtle legal fictions [Appendix B.], this jurisdiction over civil matters was gradually extended, and the Court of King's Bench now takes cognizance of all *personal* actions, equally with the Court of Common Pleas.

But this cognizance is still *founded* upon the legal supposition, that a *trespass* has been committed. [Appendix A.]

The same mode of proceeding, therefore, by *bill*, prevails, and is the general way of bringing actions, as well in *trespass*, as in all common cases.

But, although the *species* of action by *bill*, at this day used in *all* civil matters, is the same as was originally confined to cases of force or *trespass* only; yet

The ancient and present mode of proceeding by bill, the same.

* So also of *mixed* actions, as *ejectment*, &c. but the Court of C. B. still exercises exclusive jurisdiction over *real* actions, as writ of right, &c.

the

the modern practice of commencing suits (by *bill* of *Middlesex* and *latitat*) is very different from the ancient.

But the practice
in commencing
suits different.

The ancient
practice,

Formerly the practice was, actually to file, in the first instance, a certain *plaint* in writing, with the proper officer of this court, charging defendant, generally, with the commission of some *trespass* [*Appendix B.*]; and this *plaint* was called the *bill*, and is the same as we have before called the *original bill*, and the bill in *trespass*. Upon this bill being filed, there issued the *process* to bring the defendant into court, to answer to this plea of *trespass*, which was afterwards more at large set forth, when defendant appeared in court, in plaintiff's declaration.

This *process*, according to some writers, was an *attachment*; and if the sheriff returned, that defendant had nothing by which he could be attached, there then issued a precept in the nature of a *capias*.—According to other authors, the precept was the *first process* that issued to compel an appearance. But whatever the *ancient* mode might have been, it gradually became the practice to sue out the *process* in the first instance. [*Appendix B.*]

The bill of *Middlesex*.

Why so called.

The *testatum*,
bill, or *latitat*,
why so called.

This precept was also called a *bill*; but by way of distinction, was further denominated, a bill of the particular *county* in which the court sat; for which reason it is now called a *bill of Middlesex*. If the defendant were not to be found in that county, the sheriff returned the precept accordingly, *non est inventus*; and thereupon a writ issued to the sheriff of such county wherein it was thought defendant would be found; reciting, that the former precept had issued, and had been returned, and that (*testatum est*), i. e. it was *testified*, that the defendant (*latitat*) lie hid and lurked in the county, to the sheriff of which this last writ was directed; and from these two words in the writ, which was formerly in Latin*, it was sometimes called a *testatum* bill of *Middlesex*; but more commoly a *latitat*.

Alteration in
ancient practice.

As the chief use of this *plaint*, or bill in *trespass*, was to bring the defendant within the jurisdiction of this

* It was not till the reign of George the second that law proceedings were in English; when, by the 4 G. 2. c. 26. they were directed so to be, and also to be written in a common legible hand and character, and not in court hand.

court [*Appendix B.*], when this jurisdiction became more firmly established, the actual filing of this bill fell into disuse; and that precept, which was before only as *mesne* process after the bill was filed, became in fact as the *original* process, and was (as it now is) sued out in the first instance.

Still, however, a bill was, and yet is, *presumed* to be first filed; and, in order to shew the nature of the proceeding, the words *by bill* are inserted in the bill of Middlesex; so that the bill of Middlesex ought not to be (though it too often is) taken for the *original* bill, or bill in *trespass*, supposed to be filed.

As one innovation generally introduces another, the necessity even of suing out the *bill of Middlesex*, in order to warrant the *latitat*, and which was formerly strictly adhered to [*Appendix B.*], was gradually dispensed with; and unless the bill of Middlesex was actually wanted on account of the defendant residing in that county, it became the practice to sue out the *latitat*, in the first instance, into the county where he was to be found. Now, therefore, *two* essential things were *presumed* to have been done, in order to authorize this *latitat*; namely, the *original* bill, or bill in *trespass*, to have been filed, and also a bill of Middlesex to have been sued out, and returned *non est inventus*.

Introduction of present practice.

Strange as these legal fictions and presumptions may at first appear, it is upon them that the present practice of commencing suits by *bill of Middlesex* and *latitat* is founded. If the defendant, therefore, live in Middlesex, the first process is now a bill of Middlesex. If he is to be found elsewhere, the first process is a *latitat*.

Such, then, is the general description of the ancient and modern mode of proceeding by *bill* in common cases; a mode very different from any other proceedings by bill, either in this court, or the court of Common Pleas. Which difference is clearly discernible if the particular characteristics of this *original* bill, or bill in *trespass*, be attended to.—For,

Characteristics of the original bill or bills in trespass.

1st, In this bill it was absolutely necessary to allege a *trespass* committed,—which is not the case with other bills.

2d, This

ACTIONS IN GENERAL, [Ch. I.]

2d, This bill is *peculiar to this court*; whereas the proceedings by bill against attornies, members of parliament, and the like, are equally used in the court of Common Pleas.

3d, This bill is *founded upon the original jurisdiction* of this court, as the court of *criminal* judicature; whereas other proceedings by bill, are either founded upon the jurisdiction of courts in general, over their own immediate officers and prisoners, or are given by statute.

4th, This bill is used in all *common* actions, between common persons; whereas other bills are used only in particular cases, where the defendant is a privileged person, or a prisoner in actual custody.

But it is observable, that although this way of bringing an action by *bill*, is the general mode of proceeding in this court, in all common cases, and is founded upon its own *original* jurisdiction; yet the court of King's Bench may also take cognizance of any *personal* action, by virtue of a *delegated* authority from the court of Chancery.

ad Proceedings
in B. R.

Another Way, therefore, of bringing an Action in this Court, is by ORIGINAL WRIT.

In some cases, indeed, it is absolutely necessary to proceed by original; and in others, it is sometimes advisable. (See Post. chap. 4.)

By special
original.

The mode of proceeding by *original*, is precisely the same as in the court of Common Pleas, founded upon the same kind of original writ, and prosecuted nearly in the same way; only, with this difference, that in that court, (as will be shewn,) it is not customary in *common* cases, actually to sue out any original; but the process by *capias* issues in the first instance; whereas in proceedings in this court by original, the *real* original writ must *actually* be sued out before any process can issue; it is therefore more properly called, proceeding by *special original*.

Upon the whole, then, we find, that there are two ways of bringing an action in this court, in *common* cases,

cases, (i. e.) by one common person against another, where the defendant is not a prisoner in actual custody; viz.

1st, By BILL,—called, for distinction sake, the *original* bill, or bill in *trespass*, which is a proceeding founded upon the *original* jurisdiction of this court.

2d, By ORIGINAL WRIT, or, more properly, by *special original*; which is a writ issuing from the court of Chancery, *delegating* to this court an authority to proceed in the action.

It now remains to explain the several ways of bringing actions in this court in such cases as may be deemed *exceptions* to the above general mode of proceeding; but as the present volume only relates to the bringing and prosecuting of actions in *common* cases, we shall here content ourselves with the mere enumeration of these several other methods of proceeding, without attempting any explanation thereof.

The other modes of proceeding in this court in particular cases.

(A 2.) *The several Ways of bringing Actions in this Court in particular Cases.*

(A 2.)

Besides the two modes of proceeding as above-mentioned, which relate to common cases, actions may be brought in this court :

3d, By bill against *prisoners* : the mode used in all common cases where the defendant is a prisoner in *actual* custody of this court.

Against prisoners.

4th, By bill against *attornies*, or *officers of the court*. The mode used whenever an action is brought against such attorney or officer.

Against attornies, &c.

5th, By *attachment of privilege* : the mode used when an action is brought by such attorney or officer.

By attornies, &c.

6th, By bill against *peers* and *members of parliament* : a mode given by the statute 12 & 13 W. 3. c. 3. before which all proceedings against them were by *original*.

Against peers, &c.

D

Such

Such are the several ways of bringing actions in this court in particular cases; upon which, as they will be more fully treated of hereafter, no further observation will in this place be made, than that the several last-mentioned modes of proceeding by *bill*, are all different from the mode of proceeding by *bill* in *common* cases; nor do they possess one of those criterions above-mentioned, by which the latter bill is peculiarly marked and distinguished.

B.
(In C. B.)

(B) Of the several Ways of bringing Actions in the Court of **Common Pleas**.

(B 1.)

(B 1.) *In all common Cases*

1. *By Original and Capias.*
2. *By Original quare clausum fregit, and Summons.*

The court of Common Pleas does not possess any *original* jurisdiction; nor has it, like the court of King's Bench, any mode of proceeding, in *common* cases, peculiar to itself.

Its authority delegated.

Its authority is founded on original writs, issuing out of the court of Chancery, (the same as those before mentioned, by virtue of which the court of King's Bench also sometimes takes cognizance of actions,) which original writs are the king's mandates for the court to proceed in the determination of the causes mentioned therein.

Why originals
issue from the
Chancery.
[Appendix A.]

The reason of original writs issuing out of Chancery is, because, when the courts were united, which was formerly the case [Appendix A.], the Chancellor held the seal; therefore, when they were divided, he still keeping the seal, sealed all original writs. Gilb. C. P. 3.

18. Of proceedings in C. B. by original and capias.

In all personal actions, therefore, brought by and against *common* persons, the only way of proceeding in this court is, by original.

Original not really sued out;

Formerly it was absolutely necessary, (as it is now in proceedings in B. R. by original, and *sometimes* in this court,) to sue out the original writ before any *capias* could issue against the defendant, which was only *mesne process*

process to bring him into court: but now the actual suing out of the original writ is dispensed with in all *common* cases, and the *capias* goes, in the first instance, against the defendant.

An alteration, similar to that in the King's Bench, of the bill of Middlesex, or *latitat*, as before observed, being issued without any *original* bill previously filed.

But if it be the intention of the party to proceed to *outlawry*, then a special original must be properly sued out, and the mode of proceeding according to the ancient practice, strictly adhered to; so, if judgment be by *default*, and a writ of *error* brought, a special original must be taken out, and filed, to warrant the proceedings; but the want thereof is cured after *verdict*.

Except in particular cases.

Otherwise the common *capias*, without any original actually sued out, though *presumed* to be so, is the usual way of commencing an action in this court in all *common* cases.

There is, indeed, one other way, of proceeding in this court in *common* cases, which is sometimes used.

It is called, proceeding by *original quare clausum fregit*. [For a more particular account thereof, see *Appendix C.*] Let it suffice here, to observe, that this method of proceeding is grounded, in point of law, upon the same kind of original writ as the usual proceeding above-mentioned by *capias* is; the only difference between them being in the *mesne process* after the original is sued out, or at least *supposed* so to be; for in this last case also, the special original is not actually sued out in the first instance.

ad, Of proceeding by original *quare clausum fregit*. [Appendix C.]

Instead of the *process* to compel the appearance of the defendant, being by *capias* against his person, it is, in this case, by *summons* and *distress* against his goods. In a word, it is the same as the ancient mode of proceeding in this court was, before the general introduction of the *capias*; which was originally allowed but in few cases, and those favouring of *criminal* offences, but was afterwards extended to all *civil* actions. The advantage and use of this mode of proceeding, by *original quare*

By summons and distress.

The advantage thereof.

clausum fregit, is, where a defendant has effects which can be distrained, but he himself cannot be met with to be *personally* served; the process by *capias* requiring *personal* service, which is not required in the process by *summons*.

There are two ways of proceeding, therefore, in this court in *common* cases, viz.

1st, By ORIGINAL, or by *capias* founded upon the original.

2d, By ORIGINAL QUARE CLAUSUM FREGIT, or by *summons* and *distrains* founded upon the original.

It is to be observed, that the above mode of proceeding by original, relates only to actions between common persons.

For when any attorney, or officer of this court, either sues, or is sued, the proceedings *originally* commence in this court, and have no foundation in Chancery.

So proceedings against peers and members of parliament, may be either, as at common law, by original, or agreeable to the statute 12 & 13 W. 3. c. 3. by bill.

But as the mode of proceeding in these particular cases, will be fully considered elsewhere, we shall, in this place, merely enumerate, (without any further comment,)

(B 2.)

(B 2.) *The several Ways of bringing Actions in this Court, in particular Cases.*

A third way of commencing an action in this court is,

Against attor-
nies.

3d, By *bill*,—used in all actions against the *attornies* and *officers* of this court; which method is grounded upon the common law of the land, the general jurisdiction of courts over its own officers, and the established custom of this court, used and approved time out of mind.

4th,

4th, By *bill*,—used in proceedings against *peers*, and *members of parliament*, (which method is given by statute 12 & 13 W. 3. c. 3.) Against peers, &c.

5th, By *attachment of privilege*, which may be used By attorneys,
in all cases, where any attorney, or officer of the court, is plaintiff in the action; which method is likewise grounded upon the acknowledged privilege of such officers, and the long established custom of the court.

✂ The above are the several ways of bringing actions in the respective courts of King's Bench and Common Pleas; but, as this volume is confined merely to the practice of commencing and prosecuting suits in *common cases*; the only modes of proceeding with which we are at present concerned, are the proceedings by *bill*, whereon is founded the *bill of Middlesex* and *latitat*, and the proceedings by *special original*, in the court of King's Bench; and also the proceedings by original, whereon is founded the *capias*, and by *original quare clausum fregit*, and summons, in the court of Common Pleas. And as the proceedings by *special original* in the King's Bench, and by *original quare clausum fregit*, and summons, in the Common Pleas, are only used for certain purposes, they will not be blended with the general mode of proceeding by *bill of Middlesex*, *latitat*, and *capias*, but, for the sake of perspicuity, will be considered in a separate and distinct Chapter.

C H A P. II.

In what Cases special or common Bail is respectively required ; with some Remarks upon the Consequence of arresting privileged Persons, and of their Remedy and Discharge.

ACTIONS are either *personal, real, or mixed.*

Personal actions are such whereby a man may claim, first, a debt, or personal duty, or damages in lieu thereof ; or, secondly, a satisfaction in damages for some injury done to his person or property.

The *former* are said to be founded on contracts ; the *latter* upon *torts*, or wrongs. Of the *former* nature, are all actions of debt, covenant, or upon promises ; of the *latter*, all actions for trespasses, nuisances, assaults, slander, and the like.

Real actions, which concern real property only, are such, whereby a man claims title to any lands or tenements, rents, commons, or other hereditaments, in fee simple, fee tail, or for term of life. But these are now much disused, since a more expeditious method of trying titles hath been introduced by other actions, personal and mixed.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained, as ejectment and waste. 3 Black. Com. 117, 118.

Under these three heads, may every species of remedy, by suit or action in the courts of common law, be comprised ; but it is to the first of these, namely, to *personal* actions only, that the present volume of this work relates.

ACTIONS bailable
or not.
[Appendix D.]

Again, ACTIONS are either BAILABLE or *not* bailable. (For the origin and history of special bail in civil actions, see Appendix D.)

The mode of proceeding at the commencement of a suit varies accordingly.

In the *first* case, the defendant may be arrested, and compelled to go to prison, or to procure real and responsible sureties for his appearance, commonly called *special bail*.

In the *last*, he is only served with process requiring him to appear to plaintiff's charge, which is effected, if the suit be in the Common Pleas, by his entering an *appearance*; or, if in the King's Bench, by his putting in, or filing, what is called *common bail*.

The first thing, therefore, necessary to be known when an action is about to be commenced, is, whether it be *bailable* or not; or, in other words, whether the defendant ought to be *arrested*, or only *served* with process.

To discover which, it may be useful to consider,

IN WHAT CASES SPECIAL OR COMMON BAIL IS REQUIRED.

Now this depends upon

A. The NATURE of the Cause of Action, and its OBJECT, as if the Action be

- (A 1.) *For a Debt, or Demand of Money due.*
- (A 2.) *For Damages unliquidated.*
- (A 3.) *Founded on a Penalty.*
- (A 4.) *On a Judgment recovered.*
- (A 5.) *On a penal Statute.*
- (A 6.) *A second Action for the same Cause, pending the first, or otherwise.*
- (A 7.) *An Action removed from an inferior Court.*

Further, it depends upon

B. The PERSON against whom the Action is brought, and herein

- (B 1.) *Of Defendants sued in autre Droit, as Executors, Administrators, &c.*
- (B 2.) *Of Persons privileged from Arrests.*
- (B 3.) *Of Persons protected only in certain Cases, and to a certain Amount.*

Lastly, it may depend upon

C. Particular Circumstances, which may render the Case an *Exception* to the general Rule, making common Bail sufficient, when special Bail would otherwise have been required.

This will naturally lead to a few Remarks upon
D. The Consequence of arresting Persons not liable to be arrested, by reason of Privilege, or otherwise; and of their Remedy and Discharge.

§. Of the NATURE of the Cause of Action, and its OBJECT.

PERSONAL actions are either *ex contractu*, or *ex delicto*.

That is, they are founded either upon the breach of some contract, express or implied, or upon the commission of some trespass, tort, or fraud.

Actions arising *ex contractu* are, for the most part, brought for the recovery, either of some debt, or sum of money due, or of damages for the non-performance of some agreement or covenant.

Actions arising *ex delicto*, are always brought for the recovery of damages proportionate to the injury sustained, by reason of the commission of some trespass, tort, or fraud.

(A 1.) (A 1.) *Where the Action is for a Debt, or Demand of Money due.*

The criterion is the amount.

When an action is brought for the recovery of any debt, or money due, the *amount* of such debt, or demand, is the guide to shew whether such action be bailable, or not.

Which must be 10l.

And by the 12 G. 1. c. 29. the debt, or cause of action, must amount to *ten* pounds, to entitle the plaintiff to arrest the defendant, and hold him to special bail.

[This statute was explained and amended by 5 G. 2. c. 27. extended to the court of Great Sessions in Wales, by 6 G. 2. c. 14. made perpetual by 21 G. 2. c. 3. and extended to all inferior courts by 19 G. 3. c. 70.]

And more in some cases.

N. B. This is the general rule; but there are some exceptions, which are mentioned hereafter, where the debt

II. 3] SPECIAL OR COMMON BAIL.

debt must be a still greater sum, in order to hold the defendant to special bail. (For which see *post* B. 3.)

Wherever, therefore, an action is brought for any debt, or money due, amounting to 10l. whether it be an action of debt, assumpsit, or covenant, special bail is of course.

If 10l. bail of course.

But it is observable, that the above-mentioned statute does not merely say, that the *debt*, but the *cause of action*, must amount to 10l.; so that in some cases, where the *action* is not for the recovery of any actual debt, or sum of money, yet if the *cause of action* really amounts to 10l., defendant may be held to special bail.

But if the *cause of action* is 10l. it is sufficient:

Thus in *trover*, if the value of the goods converted by defendant, amount to more than 10l., plaintiff may arrest him, and hold him to special bail, and this without any judge's order. *Catlin v. Catlin*, 1 Wil. 23. S. C. Stra. 1192. *Emerson v. Hawkins*, 1 Wil. 335. *Lumley v. Quarrel*, Ray. 767. *Bangley v. Titcombe*, 6 Mod. 14.

As in *trover*.

But the court, under particular circumstances, will sometimes discharge a defendant in an action of *trover* on common bail; as where it appeared, that the defendant was a custom-house officer, and that there was a reasonable ground for his seizing the goods, which were since deposited in the king's warehouse, and that he had used due diligence in proceeding toward a condemnation in the Exchequer; the court, upon affidavit to this effect, ordered common bail to be accepted. *Barker v. Chalk*, 2 Black. Rep. 1018. *Emerson v. Hawkins*, 1 Wil. 335. Say. 53. S. C. contra.

But sometimes in *trover*, tho' for 10l. common bail only.

Moreover, by the same statute 12 G. 1. c. 29. it is not only necessary that the cause of action shall amount to 10l. but further, the plaintiff must *positively swear*, that the cause of action is to that amount, in order to arrest defendant, and hold him to special bail.

There must be an oath of the amount,

Which affidavit must be framed agreeable to the nature of the case, with a certain degree of precision and formality. Vide *post*, chap. 4. sec. 1.

which must be positive.

In all cases, therefore, where the plaintiff cannot *positively swear* that the cause of action amounts to 10l. it

it is a sure criterion, that special bail cannot, as a matter of course, be required.

Where mutual dealings, the balance must be sworn to.

And this oath, of the amount of the debt, must be without any evasion; so that, where there are mutual dealings and accounts between the parties, it is not sufficient for plaintiff to swear to the sum due upon one side only, without regarding the other side of the account. But the *balance* is the point in question, and should be the extent sworn to. Bur. 1996. *Dr. Turlington's case*.

(A 2.)

(A 2.) Where the Action is for Damages unliquidated.

Actions on the case, trespass *vi & armis*, slander, &c.

only common bail, why.

In all actions, founded either *ex contractu*, or *ex delicto*, where the object is the recovery of damages, either for the non-performance of any promise or covenant, or for misfeasance or negligence, or for the commission of any trespass or tort, such as actions on the case, covenant, trespass *vi & armis*, slander, and the like, which damages are unliquidated, and must be apportioned to the extent of the injury sustained at the discretion of a jury, the defendant cannot be arrested and held to bail; because plaintiff cannot *positively* swear that the cause of action amounts to 10l.; as it is not sufficient for the affidavit to be grounded merely upon his own conjecture, fancy, or caprice.

In some cases, a judge's order may be obtained to hold defendant to special bail,

upon good cause shewn.

But although plaintiff cannot, in such cases, arrest defendant, and hold him to special bail as a matter of course, yet it is in the discretion of the court, or any judge, to make a rule or order, authorizing him so to do, if the *cause of action* be attended with aggravated circumstances, or it is apparent that the damages will exceed 10l. This, however, is only done where good cause is shewn, and upon an affidavit of facts. *Roberts v. Slingby*, Sid. 307. Lev. 39. Brownl. 91. *Chetwin v. Vonner*, Sid. 183.

To what amount bail is to be taken.

In such cases, it is specified by the rule or order, at the discretion of the court or judge, the amount for which bail is to be taken.

Thus for scan. mag.

Thus, on motion and order, plaintiff may have special bail for scan. mag. *Earl of Stamford v. Gordel*, T. Ray. 74. *Marquis of Dorchester's case*, 2 Mod. 215. *Chetwin v. Winner*, Sid. 183.

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So by judge's order, in an action for *crim. con.* *Had-* For *crim. con.*
derwick v. Catmur, Bar. 61.

So for mesne profits after a recovery in ejectment. For mesne profits.
Hunt v. Hudson, Bar. 85. In which case, if an order be made, the recognizance is usually taken in two years value, but that is discretionary.

So for any violent or cruel assault. Gross assault.

So also, in certain cases, where the defendant is about Or if defendant is about to quit the kingdom. to quit the kingdom.

Formerly, indeed, where the action founded only in damages, and those damages were unliquidated, as in actions for the non-performance of any written agreement, where *no penalty*, or fixed sum, was agreed to be paid in case of such non-performance, if the plaintiff chose to swear positively that the damage sustained by him amounted to 10l. he might hold defendant to bail; nor would the court, on motion, interfere; for they held that the plaintiff, by the act of parliament, was the proper person to swear to his damages. *Cook and others v. Sankey*, Bar. 65. *Fleetwood v. Poistier*, Bar. 67. Formerly in actions on agreements without any penalty. Plaintiff swore to the damage at his discretion.

But a different doctrine was afterwards holden in the case of *Reynoldson v. Blades*, Bar. 108. wherein the court said, that the above cases were not to be followed, and laid down this general rule: But now otherwise.

Where damages can be reduced to a *certainty*, as in covenant for payment of money, or where a tenant covenants with his landlord to pay a certain sum for every acre of land he ploughs up, or the like, plaintiff is entitled to bail; otherwise not, especially without judge's order previous. For it is not reasonable, that defendant should be held to bail for such damages as plaintiff *fancies* he has sustained, and is pleased to swear to. Bar. 108. A general rule.

(A 3.) *Where the Action is founded on a Penalty.*

(A 3.)

The case of *Reynoldson* and *Blades*, above cited, seems only to govern those, where no penalty or forfeiture is mentioned in the agreement for the breach thereof; but where such penalty is inserted, the parties, by Upon a written agreement.

by their own specific agreement, have ascertained the damage in case of non-performance, and defendant may be held to bail thereon.

Thus bail was allowed, on an agreement in writing to deliver goods, or forfeit 100l., in an action for the penalty. *Kettelby v. Woodcock*, Bar. 86.

On a covenant. So in *covenant*, where there is a penalty for the non-performance of any agreement.

To what amount bail should be taken in such cases; But, in all such cases, bail should only be taken for a sum proportionate to the *damage* sustained, by reason of the breach of the agreement or condition; the measure of which damage is to be ascertained by plaintiff's oath.

and how far the court will interfere. The court, however, will not interfere on motion, should the plaintiff hold defendant to bail for the whole of the penalty, though the real debt, or damage, be under 10l.

In one case they did interfere. In the case of *Kirk v. Strickland*, Do. 449. where the penalty was 50l., and the real debt only 3l., and defendant was held to bail for the penalty; on motion for him to be discharged on common bail, the court said, the conduct of plaintiff was altogether unjustifiable, and that he was liable to an action. That in the case of a bond, for the performance of a promise of marriage, and in some other instances, the penalty is the real debt; but in other cases, the bail could only be taken for the sum to which the plaintiff would be entitled in damages for the breach of the condition; and although it had been their uniform practice, not to go into the merits upon such a motion, but to take the matter as it stood upon the affidavit to hold to bail, yet they granted the rule, declaring that they were persuaded plaintiff would not venture to shew cause against it.

But have since refused, But in a later case, of *Willes v. Dent*, Hil. 23 G. 3. where defendant was arrested on an affidavit, that he was indebted to plaintiff in 1000l. under, and by virtue of a certain covenant contained in an agreement, Baldwin moved, that the defendant might be discharged on filing common bail, and cited *Kirk* and *Strickland* as in point. But per Ld. Mansfield, and the court, motion was denied, and no rule *nisi* granted.

In

3] SPECIAL OR COMMON BAIL.

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In actions on bonds, to save harmless and indemnified, or for the performance of covenants, bail should not be taken on the penalty, but plaintiff should swear how, and for how much he is damnified, and assign the breaches of the covenants in his affidavit. *Whitfield v. Whitfield*, Bar. 109. *Executors of Boothby v. Buller*, Sid. 63. *Anon.* Sal. 100.

On bonds for the performance of covenants.

So in debt upon a bond conditioned for the indemnification of a parish against a bastard child, the defendant ought not to be held to bail for the penalty, but only for the amount of the damage incurred; and if that be under 10l. cannot be held to bail at all.

To what amount bail should be.

In strictness of law, the penalty in a bond is the debt due; but, by the equitable construction of the 4 Ann. c. 16. bonds with penalties are merely deemed securities for the payment of the principal, interest, and costs. The general rule, therefore, with respect to holding to bail in actions on bonds, is this: If they be for payment of money, defendant may hold to bail to the amount of the *real sum due*; if they be bonds of indemnity, or for performance of covenants, then to the amount of the *real damage* sustained by the breach; but if the *penalty* be the *real debt*, and in nature of stated damages, as in bonds for the performance of marriage, then to the full amount of the penalty.

General rule as to actions on bonds.

(A 4.) *Where the Action is founded on a Judgment recovered.*

(A 4.)

Actions brought on judgments recovered, are generally deemed litigious, and therefore not considered in a favourable light in courts of justice.

These actions discontinue.

As the practice of the courts differ with respect to holding defendants to special bail in actions on judgments, I shall endeavour to point out the several cases in which such actions may be brought, and to shew wherein this difference of practice exists.

The courts differ in their practice in this respect.

Actions on judgments may be brought,

1st, Where the original cause of action was bailable, and defendant was arrested, and held to bail thereon.

There are five cases in which such actions are usually brought.

2d,

2d, Where the original cause of action was for a debt, or demand under 10l. and therefore not bailable, but the judgment, with the costs, amount to above that sum.

3d, Where the original cause of action was for unliquidated damages, as in trespass, &c. and therefore not bailable; but judgment is above 10l.

4th, Where the plaintiff was non-prossed, or non-suited, in the original action, and the defendant, in such action, brings *his* action on the judgment of nonsuit, or nonpros.

5th, Where the action on the judgment is brought, pending a writ of error on such judgment.

The practice of the courts in the first case the same.

In the first case, it seems to be the general practice of both courts, that a defendant is not to be *arrested twice* for the same sum; if, therefore, he was arrested in the original action, he is not to be held to bail in an action on the judgment. *Collins v. Powell*, B. R. 2 D. & E. 757. *Kendal v. Carey*, C. B. 2 Black. 768.

And this, although the bail in the original action have absconded or become insolvent. *Bowen v. Barnett*, Say. Rep. 160.

Or the defendant has *surrendered* in their discharge, and obtained a *superfedeas*. *Hall v. Howes*, 2 Str. 1039. Caf. Pr. C. B. 34.

But in both courts, defendant may be held to bail in the action on the judgment, provided the original cause of action was *bailable*; but plaintiff did *not arrest*, and hold defendant to special bail thereon.

In the second case the practice differs.

In the second case, where the original cause of action was for a debt, or demand under 10l. and therefore not bailable, but the judgment, by the addition of the costs, amount to above that sum, the courts differ in their practice.

In the King's Bench special bail is *not* allowed. In the Common Pleas it is. *Belisher v. Gibbs*, Bur. 2117. *Gammage v. Watkin*, Str. 975. *Robinson v. Nicholls*, Str. 1077. *Palmer v. Needham*, Bur. 1389. *Anon. Cow.* 128.

The

The like difference of practice exists in the third case, where the original cause of action was for unliquidated damages, as in trespass, &c. and therefore not bailable, but the judgment is above 10l.

In the third case the practice differs.

So also in the fourth case above-mentioned, where an action is brought on a judgment of nonsuit or non pros, the court of King's Bench will *not* permit the defendant to be arrested and held to bail; but the court of Common Pleas will. *Byss v. Bates*, K. B. Bur. 2660. *Nightingale v. Nightingale*, C. B. Black. 1274.

So in the fourth.

The leading principle of the decisions in the court of King's Bench in all these cases, seems to be, that the action of debt on the judgment follows the nature of the *original action*, and that the intention of the act of 12 G. 1. c. 29. is only, that special bail should be required where the *original debt*, or cause of action, amounts to 10l. Whenever, therefore, the original cause of action does not amount to that sum, no special bail should be allowed in the action on the judgment.

The principle by which the court of B. R. seems to be governed.

Whereas the rule of practice in the C. B. seems to be, that let the *original cause of action* be what it may, provided the *judgment* be above 10l. and provided also, *no bail has before been given* in the action in that court, plaintiff may hold defendant to bail in an action on such judgment.

The principle by which the court of C. B. seems to be guided.

Of the two, I must confess, that, in this particular, the practice of the court of Common Pleas seems to me, the most equitable and reasonable; nor can I conceive, why a defendant, in an action on a judgment for the costs of a *non-suit*, provided they amount to above 10l. ought not to be held to special bail. For, surely, as it was observed by De Grey, C. J. and the court of C. B. in the case of *Nightingale* and *Nightingale*, "costs recovered for a groundless prosecution are as fair a debt as for any other consideration." Nor does it appear, how the principle above-mentioned by which the court of K. B. seems to have been governed in their decisions, applies to this case. For in the action of judgment on a *non-suit*, the party who was defendant, now becomes plaintiff. It is therefore the *original cause of action*, as to the *present* plaintiff.

Q. As to the reasonableness of the practice of B. R. in cases of judgment of nonsuit.

This

This suit by B. against A. is wholly distinct from that which was commenced by A. against B. It is an entire new action, founded upon an entire new *cause* of action. No proceedings have been before taken on it; but this *cause of action* is a specific debt, and above 10l.; why then is not the defendant to be held to special bail, agreeable to the statute?

The inconvenience of this difference of practice endeavoured to be remedied,

The inconvenience arising from the two courts differing in their practice in the particular instances above-mentioned, was noticed by the judges of the King's Bench in the case of *Belither* and *Gibbs*; and Lord Mansfield said, they would endeavour to remedy it. In consequence of which, he afterwards declared the result of a conference they had had with all the judges; and said, that he had laid the matter before them; that they all thought the practice of the King's Bench to be the more reasonable, and more agreeable to the act of parliament; and that he believed the court of Common Pleas would alter their practice. Bur. 2118.

But in vain, the difference still existing.

We afterwards find, however, in the case of *Nightingale* and *Nightingale*, that the court of C. B. so far from altering their practice, expressly declared, that they saw no reason to depart from it. And by Gould, justice, the reporter in *Belither* and *Gibbs*, must have mistaken Lord Mansfield, for I was then a judge of this court, and remember no such conference.

It is clear, however, that there was some misunderstanding in this matter. For I have been favoured with a memorandum from a gentleman, whose accuracy may be relied upon, intimating, that the reporter was not mistaken; that he himself has a note of the circumstance, taken by himself, in which Lord Mansfield is stated to have said as reported by Burrows.

As to the fifth case, courts of C. B. and B. R. formerly differed.

As to the fifth case above-mentioned, viz. where the action on the judgment is brought, pending a writ of error on such judgment, the court of C. B. always allowed defendant to be held to bail, if there had been no bail in the original action, notwithstanding such writ of error was brought, and bail thereon in the court of King's Bench. *Kendal v. Carey*, Black. 768. *Weyman v. Weyman*, Bag. 71.

But

But in B. R. it was held otherwise, ib. *Cressy v. Kell*, 1 Wil. 120.; where it was said, that proceedings on the judgment ought to stay while error was depending; for which see *Gribble v. Abbot*, Cow. 72.

But, by a note with which I have been favoured; it seems, that Buller J. said, in Trin. 25 G. 3. that plaintiff, in the original action, may hold defendant to bail in an action of debt upon the judgment in such original action, notwithstanding error brought, provided no bail was given in the original action.

But now seem to agree in their practice.

In an action on a recovery, in a foreign court, there shall be only common bail. *De Balf v. Mackenzie*, Str. 1243. S. C. Bar. 73.

What bail on judgment in foreign courts.

In an action on a judgment of an inferior court, though bail was given in the original action below, defendant may be held to special bail, because no bail has been given in the superior court before. *Davis, executor, v. Leckie*, Bar. 94.

On judgment in inferior courts.

But it may be generally observed, that, although in actions of debt on judgment, special bail may, in certain cases, as above mentioned, be required; yet it can only be had once; for if plaintiff in such case recovers, he cannot arrest defendant in another action upon such second judgment. *Chambers v. Robinson*, Str. 782.

Special bail only once in actions on judgment.

In debt on a judgment, after defendant has been superseded, if owing to plaintiff's laches, common bail only is requisite in both courts. *Hall v. Howes*, Str. 1039. *Blanford*, and others, v. *Foot*, Cow. 72. *Chambers v. Robinson*, Str. 782.

How if defendant was superseded,

But if the supersedeas be gained by surprise, special bail. *Whalley v. Martin*, Bar. 62.

The defendant cannot, after being superseded, be held to special bail in an action brought upon such former judgment; yet he may be charged in execution after judgment obtained in the second action. *Pulter v. Salmon*, Bar. 383.

Where the defendant might have pleaded bankruptcy in the first action, but did not, he shall still be held to special

Or become bankrupt.

special bail upon the judgment, because the court will look no further than the judgment. *Combes v. Blackall*, Str. 477.

(A 5.)

(A 5.) *Where the Action is on a penal Statute.*

No bail,

In actions on penal statutes, the defendant, generally speaking, is not to be arrested and held to special bail, because the penalty is in the nature of a fine or amercement, set on the party for an offence committed; and, therefore, no persons ought to suffer any inconvenience, by reason of such law, till he is convicted of the offence. *St. George's case*, Yelv. 53. 2 *Brown*, 293. *Presgrave's case*, Comyns, 75. *Barnes*, 80. *Whittingham v. Coghlan*.

So in *qui tam* actions.

Except authorised by the statute;

But there are some exceptions to this rule; as where the statute on which the action is brought expressly authorises an arrest, as the 11 & 12 W. 3. for exporting wool; 26 G. 2. c. 21. for having unsealed wrought silk in defendant's custody. *Rex v. Rebord*, Bur. 1569.

Or in actions on the lottery act, 27 G. 3. c. 1. *Davis v. Mazzinghi*, 1 D. & E. 705.

Or on the 4 G. 2. c. 28. for double rent.

Or the action be on a remedial statute.

So if the action be on a remedial statute, as on statute 9 Ann. c. 14. by the loser against the winner at play; because it is at the suit of the party grieved, wherein defendant is debtor to the plaintiff in so much money had and received. *Turner v. Warren*, Str. 1079.

(A 6.)

(A 6.) *Where it is a second Action for the same Cause, pending the first, or otherwise.*

It is a maxim in law, *nemo debet bis vexari pro eadem causa*.

Formerly no bail in a second action, after a nonpross or nonsuit.

So strictly was this principle formerly attended to, that even if a plaintiff were nonprossed or nonsuited, though perhaps for a mere defect in the pleadings, and afterwards brought a second action, defendant could not in such second

second action be arrested. *Almanzor v. Davilac*, Com. 94. S. C. Ray. 679.

But the practice is now otherwise; and plaintiff may, after a nonpros or nonsuit, bring a second action, and hold defendant to special bail, it being deemed a sufficient punishment to plaintiff to pay costs in the first action. *Turton v. Hayes*, B. R. Str. 439. *Harris v. Roberts*, C. B. Bar. 73.

But now otherwise.

In B. R. however, a distinction hath been made between a nonsuit upon the merits, and upon a slip or informality; in the *latter* case, defendant may be held to bail in a second action, but *not* in the *former*.

Difference between nonsuit on the merits or not.

So if plaintiff finds that he has mistaken his form of action, or the like, he may *discontinue* upon payment of costs, and arrest defendant in a second action for the same cause. *Bates v. Barry*, 2 Wil. 381.

Of arresting defendant in a second action, after discontinuance of the first.

But he should be always careful to discontinue regularly the first action, and to get the costs taxed and paid, before he commences the second action; otherwise the defendant, upon motion, will obtain his discharge from such second arrest, upon filing common bail; for it is a general rule, that no one ought to be arrested in a second action, whilst another action for the same cause, and in which he had been before arrested, is depending. *Belfante v. Levy*, Str. 1209.

Such discontinuance must be regular.

The case of *Olmius v. Delany* was, indeed, an exception to this rule: it was an action of debt on bond for 900 l.; defendant put in bail, who justified, and were allowed; plaintiff afterwards, finding that they were forsworn and worth nothing, discontinued, having *first* arrested the defendant in a second action, and held him to bail; upon which defendant moved to be discharged on common bail, according to the above general rule; but on shewing cause, a scene of villainy appearing to the court, they discharged the rule, and said that plaintiff was right in laying hold of him as he did; for had he discontinued before, the defendant probably would have absconded, and therefore ordered him to be held to special bail. Str. 1216.

Under strong circumstances of villainy, arrests in second actions have been allowed before discontinuances;

But the circumstances must be strong,

There should be strong circumstances of fraud and villainy, on the part of defendant, to justify plaintiff in such a step; for, unless the necessity of it clearly appeared, no court would countenance the proceedings.

Or the court will discountenance such proceeding.

We accordingly find, in the case of *Belcher and Gansell*, Bur. 2502, which was also an attempt by plaintiff to get rid of bail who had justified, but were afterwards found to be worth nothing, that the attorney was reprimanded by the court for his conduct, the side-bar rule for discontinuing the former action was discharged, and the original bail still remained liable to their recognizance; and yet, in this case, the first action was actually discontinued before the commencement of the second; but such discontinuance not being until after bail had justified, and the court conceiving the whole to be a trick to oppress defendant, shewed their disapprobation of it, notwithstanding the case of *Olmus and Delaney*, and said, that the attorney ought first to have applied to them disclosing all the circumstances.

In such particular cases, application should be made to the court.

If cause referred defendant may be arrested on the award, though bail in original suit.

Where a cause, in which defendant was held to bail, is referred to arbitration, and the arbitrator awards to the plaintiff a sum, exceeding 10 l. the defendant may be arrested again in an action upon the award; for the reference put an end to the first action, and a new cause of action arose by the arbitration. *Collins v. Powell*, 2 D. & E. 756.

(A 7.)

(A 7.) *Where the Action is removed from inferior Courts.*

Former practice.

Various cases are to be found in the books respecting the practice of holding to bail where the cause was removed out of an inferior court; and the general rule seems to have been, that in all cases, excepting that of an executor, where the cause was removed by *habeas corpus*, the defendant was obliged to find special bail, although the original cause of action would not have beenailable in the superior court; because otherwise, the defendant had it in his power to put the plaintiff in a worse condition than he was in before, and this they did out of indulgence to inferior courts. *Page v. Price*, Sal. 98. 102.

Now settled by statute.

But now the practice, in this particular, is clearly settled by the 19 G. 3. c. 70; which, in the first place, has abolished

13] SPECIAL OR COMMON BAIL.

53

abolished all distinction between *inferior* and *superior* courts, as to the sum for which a person may be arrested; and secondly, has positively enacted, that defendants must find bail upon removal of the cause, though not originally of a bailable nature.

S. 1. No person shall be arrested or held to special bail upon any process issuing out of any inferior court, where the cause of action shall not amount to 10 l. and upwards.

S. 6. No cause, where the cause of action shall not amount to 10 l. or upwards, shall be removed into any superior court by *habeas corpus*, or otherwise, unless the defendant shall enter into a recognizance for payment of debt and costs, in case judgment shall pass against him.

Having duly considered the NATURE of the cause of action, and its OBJECT, the next thing to be attended to, in order to discover whether SPECIAL or COMMON bail is required, is,

13. The Person against whom the Action is brought. 13.

An action, from its nature and object, may be, what is usually termed, a bailable action; and yet the defendant against whom it is brought, owing to his peculiar situation, or some other circumstances, may not be liable to be arrested and held to special bail; it will be serviceable, therefore, to point out what description of persons are legally intitled to this exemption: And first,

Persons not required to put in special bail.

(B 1.) Of Defendants sued in *auter Droit*.

(B 1.)

By a defendant sued in *auter droit*, is here to be understood, any person against whom an action is brought as the representative of another, for a debt, or cause of action, contracted or incurred, not by the defendant himself, but by the person whom he so represents.

What is meant thereby.

In which case, although he may be liable to an action, and answerable to the extent of the property of the principal which he may have in his hands, yet it would be

contrary to reason and justice if his person were subject to an arrest and imprisonment.

Heirs, executors, administrators, exempt,

Heirs, executors, and administrators, therefore, when charged *as such*, cannot be arrested and held to bail; because the demand is not on the person, but on the assets of the deceased. 2 Brown, 293. *Smale v. Warm*, 3 Bull. 316.

Unless they make themselves answerable

If, however, they commit any act, to make themselves and their own property legally answerable for such demand, then they may be arrested and held to special bail; because the action, in such case, attaches upon them, and they are not sued in *auter droit*, but in their *own* right.

By promise,

Thus, if an heir, executor, or administrator, personally promises and undertakes, in writing, to pay any debt or legacy, such promise will be binding, and he himself rendered liable to be arrested for payment of such demand. *Mackenzie v. Mackenzie*, 1 D. & E. 716.

By a *devastavit*,

So if an executor, or administrator, has been guilty of a *devastavit*, or wasting the deceased's goods; in an action suggesting such *devastavit*, he may be arrested; because, by such misconduct, he has rendered himself and his own property liable. *Page v. Price*, Salk. 98. *Horsey v. Daniel*, 2 Lev. 145. Sid. 63. Executors of *Boothby v. Buller*.

But then it should be an actual *devastavit*, returned by the sheriff, or at least grounded on an affidavit. *Duprett v. Testard*, Carth. 264. A mere suggestion of a *devastavit* is not sufficient. 1b.

Bail, or sureties.

Upon the same principle, in actions against the bail or sureties of another, defendants shall not be arrested, since they are sued not for a debt contracted by themselves, but by their principal for whom they are bound; and besides, were it otherwise, there might be bail *ad infinitum*.

In all actions, therefore, on bail bonds, replevin bonds, and the like, common bail only is required. *Dux Ormond v. Brierly*, Sal. 99.

Assignees of bankruptcy.

So assignees of bankrupts, being merely the representatives of another, are not liable to be arrested.

(B 2.) Of

(B 2.) *Of Persons privileged from Arrests.*

(B 2.)

Further, there are certain persons, who, though sued *in their own right*, are by law *privileged* from arrest; and this either

In what cases generally.

(B 2. a.) *By reason of the Defendant's legal Incapacity.*

(B 2. b.) *By reason of the Dignity of Defendant's Station.*

(B 2. c.) *By reason of the peculiar Nature of Defendant's Profession or Office.*

(B 2. a.) *Of Defendants who, by reason of legal Incapacity, are privileged from Arrests.* (B 2. A.)

Thus, on account of their legal incapacity, *minors* cannot be arrested, nor a *feme covert* or married woman.

Minors.

Indeed no *action* can be brought against a *feme covert* alone; but, in all cases, where it is necessary to make her a party to the suit, the husband must also be joined.

Femes covertis.

In which actions against husband and wife, the husband only ought to be arrested, who is to put in bail for himself and wife. *Roberts v. Andrews & Un.* Black. 720. *Edwards v. Rourke & Un.* 1 D. & E. 486.

Not to be arrested.

Nor can the wife be arrested, although the husband cannot be found, if it be notorious that she is a married woman. *Ib.*

And this privilege, or protection, is founded not only upon the principle of the legal incapacity of a *feme covert*, to do any act for herself; but also because, as she has for the most part no property of her own, she might, if liable to an arrest, be imprisoned for life.

Why.

But there are some exceptions to this rule; and, in certain particular cases, a *feme covert* may be arrested.

Exceptions to the rule.

As if the coverture be not open and notorious.

And in what cases

Or defendant has imposed upon plaintiff in passing for an unmarried woman. *Pearson v. Meaden*, Black. 903. *Wilson v. Campbell*, M. 20 G. 3.

She may be arrested.

Or if she live notoriously in a state of separation, and the like. *Corbet v. Poelnitz & Un.* 1 D. & E. 5.

How action to
be then brought?

In which cases, the action ought to be brought against her only.

With respect to taking a feme covert in *execution*, the law is somewhat different; but it is sufficient, in this place, to have shewn how far she is liable to be arrested on *mesne* process. Any further proceedings, by or against baron and feme, must be reserved to another part of the work.

(B 2. b.) *Of Defendants who, by reason of the Dignity of their Station, are privileged from Arrests.*

1.
Royal family
and servants.

1st, The royal family, as the highest in dignity, are the first intitled to this privilege. It is extended also to the king's servants in ordinary, and menial servants. *The King v. Moulton, &c.* 2 Keb. 3. *The King v. Thrampton*, ib. 485. *Dixon v. Killigrew*, T. Ray. 152.

In the first of which cases, it is said, that the court declared their opinions, that none of the king's servants in ordinary can be arrested without notice first given to the lord chamberlain, who cannot privilege any perpetually; but, in convenient time, must either remove such, or make them pay their debts, the privilege being the king's, not the parties; but if the bailiffs, without notice, do arrest any such, the messengers of the lord chamberlain cannot rescue the prisoner by letter (the arrest being lawful), nor by his warrant; but the party who sued is punishable for his contempt.

To what ser-
vants.

But this privilege only extends to the servants of the king and queen *regent*, and not to those of the queen *consort* or queen *dowager*. *Starkie's case*, 1 Keb. 842. *The King and Capell v. Band and Segrave*, ib. 877.

2.
Ambassadors,
ministers, and
their domestic
servants.

2d, Ambassadors, public ministers, of any foreign prince or state (authorised and received as such by his majesty), and their domestic servants, are privileged from arrests.

7 Ann. c. 12.

This is declared to be the law by the 7 Ann. c. 12.; but this act was only a *declaratory act*; for the privilege itself is founded upon the *law of nations*, and always existed.

existed. The only thing new in that act, is a clause, s. 4. which gives a summary jurisdiction for the punishment of the infractors of this law. Bur. 1480:—
 “Whereby the party suing, and the attorney prosecuting such suit, and the officers executing the process, being convicted by the oath of one witness before the Lord Chancellor, the C. J. of B. R., or C. J. of C. B., or any two of them, shall suffer such pains, penalties, and punishment, as they, or any two of them, shall impose.”

s. 4. Punishment of offenders against the act.

The above act of parliament was occasioned by a particular circumstance, namely, the arresting of an ambassador from Peter the Great, Czar of Muscovy, who, highly resenting the affront, this act was passed, and sent to him as a national apology. See an account thereof, 1 Black. Com. 255.

Occasion of that act.

By s. 5. of the above act, there is a proviso, “that no merchant, or other trader whatsoever, within the description of any of the statutes against bankrupts, who puts himself into the service of any such ambassador, or public minister, shall have the benefit of that act.”

Proviso with an exception to merchants and traders.

And further, “that no person shall be proceeded against as having arrested the servant of any ambassador, or public minister, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriffs of London and Middlesex for the time being, or their under sheriffs, or deputies, who shall, upon the receipt thereof, hang up the same in some public place in their offices, whereto all persons may resort, and take copies thereof, without fee or reward.

Necessity of registering the ambassadors servants names, and where.

Since the passing of the act of 7 Ann. various cases have been decided concerning this privilege, from which it may be collected, 1st, with respect to the *ministers* themselves who are privileged:

The Stat. Ann. explained.

That they must be ambassadors, or public ministers, authorised, and received here as such.

With respect to the ambassadors themselves to be protected.

Consuls, or agents of commerce, though received as such by the courts to which they are employed, are not such ministers as are protected or privileged.

With respect to
their servants.

2d, With respect to the *servants* of such ambassadors :

Must be domestic.

Such servants must be, *bona fide*, *domestic* servants. *Poitier v. Croza*, Black. 48.

Not that it is necessary for them to lie in the house, (though that was formerly thought essential, 1 Wil. 79.) as many houses are not large enough to lodge all the servants of ambassadors ; but they ought to be actual servants, employed in or about the house. *Toms v. Hammond*, Bar. 370.

Essentials to
make them so.

There must be a *retainer*, an *office by name*, and an *actual service*, in that office. *Triquet v. Bath*, Black. 474.

Which must be
sworn to.

The nature of the service, and the actual performance of it, must be particularly sworn to. Bur. 1479. *Peach and others, v. Bath*. But it is not expected that every particular act of the service should be specified. lb.

What the affidavit
must contain.

The affidavit, therefore, to discharge such servant, if arrested, should specify his employment ; for swearing generally that he is a domestic, or menial servant, is not sufficient ; nor, on the other hand, is it enough to shew that he is a servant of an ambassador, and to specify the nature of that service, unless it further appears, that he is also, generally speaking, a *domestic* servant. *Poitier v. Croza*, 1 Black. 48. *Seacomb v. Bouvincy*, 1 Wil. 20. *Carolino's case*, 1 Wil. 78. *Lockwood v. Coysgarne*, Bur. 1676.

But the *secretary* of a foreign minister, though not immediately a domestic, is a servant within the statute. *Hopkins v. De Robeck*, 3 D. & E. 79.

The affidavit must also shew, that he was such domestic servant at the *time* of the arrest ; for it will be no protection to make him so afterwards. *Heathfield v. Chilton*, Bur. 2017.

It should, lastly, shew that he is not a trader, or subject to the bankrupt laws.

Privilege extends to the foreign servants of ministers.

N. B. This privilege from arrest extends as well to the servants who are natives of the country where the minister resides, as to his foreign servants whom he brings over with him. Bur. 1677.

The

The courts require the above particularities, in order to prevent any unjustifiable abuses of this privilege, which might otherwise be perverted into a mere scheme to screen people from their creditors.

For although the process of the law shall not take a domestic servant out of the service of a public minister, yet a public minister shall not take a man from the custody of the law. Bur. 2017.

3d, With respect to the proviso in that act, in s. 5, as to the exception to traders or merchants, it was held, that an English secretary to a foreign minister, who was formerly a trader, but who hath some years back left off trading, does not come within the exception, though he may even be under suspicious circumstances. *Triquet, and others, v. Bath*, Bur. 1478.

With respect to the exception in the statute as to traders.

For if such service, as is here spoken of, be sufficiently proved by affidavit, the court will not, upon bare suspicion only, suppose it to have been merely colourable and collusive. Ib.

4th, With respect to the other part of the proviso, namely, the registering of the names of such ambassador's servants, it is to be observed, that this is no condition precedent to the being entitled to the privilege of a public minister's servant. It only relates to the officer who arrested him, and who, in case of the neglect of such entry, is not liable to be punished under that statute, although the person arrested may still, on application to the court, be discharged. Bur. 2017. *Hopkins v. De Robeck*, 3 D. & E. 79. *Seacombe v. Boulney*, 1 Wil. 20.

With respect to the registering of the names of such servants.

3. The next persons to be mentioned as privileged from arrest, on account of the dignity of their station, are, peers of the realm of *England*, and peeresses, as well by birth as by marriage.

3. Peers and peeresses.

The like privilege is given by the act of union, 5 Ann. c. 8. art. 23, to peers and peeresses of *Scotland*.

And even if defendant succeeds to a peerage after he is arrested in an action, he will on motion be discharged. *Trinder v. Shirley*, Do. 45.

But

Who to be deemed such.

But by peers of the realm of England, is to be understood lords of the parliament of England; so that all other noblemen, not being lords of the parliament of this realm, are not privileged. This privilege, therefore, does not extend to Irish or other foreign peers. 2 Inst. 48. 3 Inst. 30.

Not to peeresses by marriage, who afterwards marry commoners;

Nor to peeresses who became such by marriage, and afterwards have married commoners; but it is otherwise, if they were peeresses by descent: "For if a woman that is noble by descent, marry one that is under the degree of nobility, she remaineth noble still; but if she gain it by marriage, she loses it if she afterwards marry under the degree of nobility." Co. Lit. 16. b.

Nor to the son of a peer;

Nor to the son and heir apparent of a peer; but an infant peer is privileged, his person being held sacred. Co. Lit. 156. 2 Inst. 48.

Nor to their servants.

Formerly the servants of peers, who were necessarily and properly employed about their estates and persons, were privileged from arrest. *Chester v. Upfdale*, 1 Wil. 278.

But by the 10 G. 3. c. 50. s. 10. this privilege, together with all others which derogated from the common law in matters of civil right, save only as to the freedom of the members persons, was abolished. 1 Blac. Com. 165.

4. Members of parliament.

4. By the privilege of parliament, as also by the statute 10 G. 3. c. 50, *members of parliament* cannot be arrested.

To what extent.

This, however, is a limited protection; namely, for forty days after every prorogation, and forty days before the next appointed meeting; which is now in effect as long as the parliament subsists, it seldom being prorogued for more than four-score days at a time. 1 Blac. Com. 165.

In what cases.

This privilege of parliament holds in the case of informations for the king, except it be for treason, felony, or the like.

Exceptions.

For it is to be observed, that privilege of parliament does not hold in any of the three following cases, *viz.* treason,

treason, felony, or the peace; that is, where surety of the peace is required. *The King v. Wilks*, 2 Wil. 159.

(B 2. c.) *Of Persons privileged by reason of the peculiar Nature of their Profession or Office.* (B 2. c.)

Persons privileged from arrests, by reason of the nature of their profession or office, are, *attornies and other officers of the courts*, whose constant attendance in the courts is presumed to be necessary. Attornies and officers of the courts.

If therefore such person be arrested, he is intitled to his discharge; for the mode of obtaining which, see post D. in this chapter.

(B 3.) *Of Persons protected only in certain Cases, and to a certain Amount.* (B 3.)

The persons who have hitherto been spoken of, are such as are *wholly* privileged from arrests; but there are some who are only *partially* protected in certain cases, and to a certain amount; such are,

Soldiers and sailors in his majesty's service, who have either been inlisted therein against their will, or have voluntarily inlisted themselves. Soldiers and sailors.

By the acts for recruiting his majesty's land forces and marines, it is enacted, that no person inlisted shall be taken out of his majesty's service by any process, other than for some criminal matter: but it was held in a case on one of these acts, viz. 30 G. 2. c. 8. that it only meant to privilege such persons from arrests as were under that act *compelled* against their wills to serve as soldiers, and not to a person who *voluntarily* inlisted himself. *Turner v. Turner*, Bur. 466. Inlisted soldiers not to be arrested.

Where defendant, an inlisted person, has been arrested and held to bail, he may be surrendered by his bail in their own discharge; for the manner of doing which, *vide* the case of *Bond v. Isaac*, Bur. 339. If arrested, may be surrendered.

By 1 G. 2. st. 2. c. 14. & 31 G. 2. c. 10. for encouraging seamen to enter, "No person who shall list *himself*" Volunteer seamen not to be arrested under act.

“ self to serve on board any of his majesty’s ships of
 “ war shall be held to bail, but on affidavit, that the sum
 “ justly due amounts to 20l.”

Who are deemed
 within this sta-
 tute.

A seaman, upon the ship’s books, though he has ab-
 sented himself, is a seaman within the act. *Studwell v.*
Bunton, Bar. 95.

Armourers, gunners, &c. enlisted as common sea-
 men, are within it. *Barnsley v. Archer*, Bar. 114.

Volunteer sol-
 diers not to be
 arrested under
 20l.

By the mutiny act (31 G. 3. c. 13. s. 65.), in order
 to prevent so far as may be any unjust or fraudulent
 arrests that may be made upon soldiers, whereby his
 majesty and the public may be deprived of their service, it
 is enacted, that no person who is listed, or shall list
 himself, as a volunteer, shall be taken out of his majesty’s
 service by any process or execution, other than for some
 criminal matter, unless the original sum, or cause of
 action, amounts to 20l. over and above all costs, and a
 memorandum thereof marked on the back of the pro-
 cesses.

Who comes
 within this act.

Not only common soldiers, but non-commissioned
 officers and privates, have been held within the statute.
 So are serjeants; and the certificate of the *secretary* at
 war of the nature of a serjeant’s station, may be read
 as evidence. *Lloyd v. Wooddall*, 1 Blac. 29.

So is a drummer and a gunner in the train of artillery.
Johnson v. Louth, Str. 7. So a trooper just enlisted.
Bayley v. Jenners, Str. 2. So recruits just enlisted. But
 an out-pensioner of Chelsea Hospital is not. *Bowler v.*
Owen, Bar. 432.

It only extends
 to civil cases,
 not to criminal.

But the legislature, in this act, had only in view the pre-
 venting of arrests in *civil* actions, it has no relation to
 crimes or any thing of a *criminal* nature, so that a soldier
 is liable to be taken up for disobeying any order of a
 justice, inasmuch as that is an offence so far criminal,
 that in almost every instance the party may be indicted
 for it. *The King v. Archer*, 2 D. & E. 273.

Money to be re-
 funded, if paid
 for his discharge.

If a person privileged within these statutes be ar-
 rested, and pays the debt, in order to obtain his liberty,
 the court, on motion, will compel the party arresting him
 to

to repay him such money; it having been held equally reasonable, that the money paid by defendant to obtain his liberty should be repaid, as that his person, in case the application had been on that account, should have been discharged. *Metbuen v. Martin*, Say. 107.

So persons living in Wales, and the counties palatine, are protected from arrests to a certain degree; for, by the statute 11 & 12 W. 3. c. 9. "sheriffs, &c. are not to take special bail in *Wales* or *counties palatine*, upon process out of his majesty's courts at Westminster, unless affidavit be first made, and filed in court, that the cause of action amounts to 20 l. or upwards; and bail not to be taken for more than the sum expressed in the affidavit."

No arrest in
Wales or coun-
ties palatine, un-
less cause of ac-
tion amounts to
20 l.

Special bail was taken for 12 l. upon process into Lancashire; and on motion for common bail, plaintiff insisted, that as the 12 G. 1. c. 29. about not holding to bail under 10 l. had an exception to Scotland only, it was intended to extend to all other places, and consequently was a virtual repeal of 11 & 12 W. 3. But per cur. they are not inconsistent; for the 12 G. does not say, you shall have bail for 10 l. but only that you shall not have bail under 10 l.; whereas, in 11 & 12 W. 3. there are negative words, and the oath, in this case, being only to 12 l. plaintiff is not entitled to hold defendant to special bail. *Smith v. Dudley*, Str. 1102. *Ld. Molineux v. Charles*, Bar. 69. *Rayner v. Borough*, Bar. 89. where it is also said, that the statute of W. is not repealed by the 12 G. 1.

C. Of particular Circumstances in the Case which exempt Persons from being held to special Bail, who would otherwise be liable thereto.

The action may, in its nature and object, be a bailable one, and the party against whom it is brought may not come within any of the descriptions above mentioned, so as to intitle him to privilege or protection; and yet, from some peculiar circumstances, defendant may be exempt from special bail.

Such is the case of certificated bankrupts, with respect to all causes of action which accrued previous to the commission of bankruptcy, and which could have been proved

Certificated
bankrupts dis-
charged from
debts before
bankruptcy,

proved under it; for which they are not only not liable to be arrested, but the debt, or demand itself, is discharged by the certificate; and this, though judgment is not obtained till after the certificate allowed. *Cooke's Bankrupt Laws*, 343.

And interest and costs attaching thereto;

And not only the original debt itself is discharged, but the whole that relates thereto; as any interest that may have accrued thereon, or any costs that may have been incurred, in the suing of such debt since the bankruptcy; as they all stand upon the same footing. *Blandford and others, executors of Froud, v. Foote*, Cow. 138. *Graham v. Benton*, 2 Str. 1196.

But not so, if he pleads a false plea as executor.

But if the bankrupt pleads a false plea in an action against him as executor, between the time of the commission and of his obtaining his certificate, whereby he has had judgment against him as to the costs of such plea *de bonis propriis*, he shall not, after he has obtained his certificate, be discharged from such costs. *Howard, and other executors, v. Jemmot, executor*, Bur. 1368.

Nor is a bankrupt free from arrest, except where the debt could be proved under the commission.

It is, however, to be observed, that this exemption only holds good where the *cause of action* was previous to the bankruptcy, and the debt itself could be proved under the commission; for otherwise they are liable to an arrest. *Hockley v. Merry*, Str. 1043. *Tully v. Sparks*, Str. 867. *Cockerill v. Ouston*, Bur. 436. and a variety of other cases; for which see *Cooke's Bank. Laws*, 345.

Bankrupt cannot be arrested on a subsequent promise.

And even if a bankrupt, after having obtained his certificate, promises a creditor, who did not prove his debt under the commission, to pay him, and is afterwards arrested on that promise, the court will discharge him on common bail. *Bayley v. Dillon*, Bur. 736.

Why.

And upon *this* principle, that the action itself is founded merely upon a conscientious obligation; for, in point of law, the certificate had exonerated him from the payment of the debt; the fresh promise, therefore, was made from a conscientious motive. But were he liable to be arrested and imprisoned on such promise, "it would be taking advantage of conscientiousness to use it against conscience;" an action, however, will lie on such promise. Bur. 737.

But

But if the commission, or the certificate, be fraudulent, the court will not discharge the bankrupt on common bail. *Commission must not be fraudulent.*
Sowley v. Jones, Blac. 725. *Martin v. O'Hara*, Cow. 823. *Robson v. Calze*, Do. 228.

But in all such cases the defendant should plead his bankruptcy; for if he might do so, and neglects it, and a judgment is obtained, he shall be liable to be arrested in debt on such judgment; nor will the court go further back than the judgment to inquire into the time of the bankruptcy. *Defendant must plead his bankruptcy in time.*
Combes v. Blackall, Str. 477.

If, therefore, defendant has obtained his certificate in time, it may be pleaded; but if not properly allowed and obtained till after judgment, he must apply to a judge, or move the court for his discharge, and verify the certificate by affidavit. *If certificate not obtained time enough to plead it, how to proceed.*
Tarleton v. Fisher, Do. 671. *Graham v. Beuton*, 1 Wil. 41.

And even should he, after judgment obtained, bring error, in order to delay execution until his certificate be allowed, and afterwards, pending error, obtain such certificate, he may be discharged. *Whenever certificate obtained, he may be discharged.* Ib.

Which discharge is founded upon the 5 G. 2. c. 30. s. 13.

But such discharge only extends to the *person*, not to the goods of the bankrupt; and the above last cited case must be so construed. If, therefore, an execution against the goods of a bankrupt be taken out after his certificate is signed by the creditors, and before it is allowed by the chancellor, it is valid. *Discharge only extends to his person, not his goods.*
Callen v. Meyrick, 1 D. & E. 361.

Another peculiar circumstance which exempts a person from being arrested, is, the having been discharged since the cause of action accrued on any of the insolvent acts, either as an *insolvent debtor* or a *fugitive*; for, by these acts, after such discharge, the *person* of the debtor is free from arrest for any cause of action accruing before the time mentioned in such act, but his *property* is still liable; for the debt itself is not extinguished, as in the case of a certificated bankrupt. *Insolvent debtors and fugitives.*

F

By

But

To whom as
fugitives the acts
extend.

By the acts of parliament, with respect to fugitives, they must be such persons as went abroad for the purpose of avoiding their creditors. If, therefore, they go there for the purpose of trading, or have chiefly lived and contracted their debts there, they will not be deemed fugitives within the acts. *Sheldon v. Foot*, Say. 308. *Honour v. Wetherhead*, 1 Wil. 85.

To what debts
the acts extend.

A debt due, by bond or promissory note, given before the day mentioned in the insolvent act, though not payable till after, is *debitum in presenti* though *solvendum in futuro*, and defendant so discharged shall not be liable to be arrested thereupon; but otherwise of a debt payable upon a contingency, from which he would not be discharged, unless the contingency had happened before the day mentioned in the act. *Paget v. Wheate*, Do. 671. *Workman v. Leake*, Cow. 22.

To what places.

They only extend to England; a discharge upon such an act passed in Ireland not sufficient. *Denbury v. Perew*, 1 Barn. 420.

Persons super-
seded in a prior
action for the
same cause.

A third circumstance which exempts a person from being arrested, is, the having obtained a *superfedeas* in a prior action brought for the same cause; in which case, his *person* is afterwards free from arrest for such debt or demand, though his *property* is still answerable.

The effect of a
subsequent pro-
mise.

Nor will any subsequent promise, in either of the two last cases, be a sufficient ground for arrest.

It will not ren-
der them liable
to an arrest.

Thus, where a defendant, having given his note for 36l. was discharged on an insolvent debtor's act, and afterwards promised to pay the debt by instalments, and actually did pay some of the instalments, upon his being arrested for the residue, he was discharged upon common bail. *Turner v. Scomberg*, Str. 1233.

In like manner, where the defendant, being arrested for 25l. lay in gaol till he was superseded, and the plaintiff, meeting him afterwards, got a note of him for 20l. and brought a fresh action upon it, and held him to bail, the court discharged him upon common bail. *Taylor v. Wasteneys*, Str. 1218.

And

And upon this principle, that such subsequent promise being made without any new consideration passing, the old debt is still in existence, and is, in fact, the *real* cause of action. Since, therefore, the defendant would not be liable, after such discharge or *superfedeas*, to be arrested for the original debt, neither shall he be so by virtue of such subsequent promise, made without any fresh consideration.

Why,

Under this head may be classed all actions brought upon illegal considerations, or even where the legality of the contract is doubtful; in which cases, if the defendant be arrested, the court, on affidavit of the fact, will discharge him on common bail. *Sumner v. Green*, C. B. T. R. 301.

Common bail in actions on illegal considerations.

Thus have we endeavoured to point out the various considerations necessary to be attended to, for the better ascertaining whether special or common bail only is required; and to shew, that it depends first upon the nature and object of the action itself; secondly, upon the person against whom it is brought; and, lastly, upon particular circumstances which may render it an exception to the general rule; it only now remains, before we conclude this chapter, to make a few general remarks upon

D. The Consequence of arresting any Person not liable to be arrested, by reason of Privilege or otherwise, and of their Remedy and Discharge.

If any person, in any common case, arrest another, and hold him to special bail, without having some cause of action against him amounting to 10*l.* such person will be liable to an action upon the case, for maliciously holding him to bail.

In common cases, the remedy by action for malicious arrest.

So if he hold him to bail for a much greater sum than is due.

But before such action, for maliciously holding to bail, is brought, the first action on which the arrest is wrongfully made,

Original suit must be first determined.

made, ought to be determined. *Morgan v. Hughes*, 2 D. & E. 232.

Against whom
such action to
be brought.

And this action can only be brought against the party at whose suit such arrest was made; for neither the sheriff, or his officers who made the arrest, are liable. *Tarlton v. Fisher*, Do. 677. Nor the attorney who sued out the writ, although he well knew that there was no cause of action, and was even himself a witness to the payment or release of the debt for which defendant was arrested; for what an attorney does, is only as servant to another, and in the way of his calling and profession. *Barker v. Bram & Norwood*, 3 Wil. 379.

Such is the mode of redress in those cases only, where the arrest, and the holding to bail, are illegal for want of a just and sufficient *cause of action* to render the defendant liable to such arrest.

Of the remedy
in case of a pri-
vileged person
being held to
bail.

For where there is a just *bailable* cause of action, but the defendant is not subject to an arrest by reason of his *privilege* or *protection*, as before described; the remedy, in case he be arrested, notwithstanding such privilege, is of a different nature.

His discharge.

The chief thing to be obtained under such circumstances, is the *discharge* of the person arrested; the manner of obtaining which will be presently shewn.

Doubt as to any
action being
maintainable.

As to any *action* for damages, in such a case, it seems somewhat doubtful, whether it can be maintained. In the case of *Cameron v. Lightfoot*, Blac. 1194. De Grey, C. J. took pains to discourage the kind of action; and although he did not positively give it as his opinion, that in no such case an action would lie; yet he strongly intimated the difficulty of maintaining it; and that the unfrequency of such actions was no slender proof of the general opinion concerning them. For though, says he, in many cases (speaking of privileged persons being arrested) the process is declared *void*; yet in *none* has any instance been produced, of an action of false imprisonment being brought.

No instances.

A difference be-
tween arrest on
void process, and
at a wrong time.

He makes, however, a difference (and surely justly) between cases where the process itself is *void*, (as of arrest on Sundays, of ambassadors, and the like,) and where

D.] THEIR REMEDY AND DISCHARGE.

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where (as in that case of Cameron and Lightfoot, which was an action for arresting the plaintiff, *redeundo as a witness* from the court) the writ is not void, nor the arrest illegal, but only improperly *timed*.

In the first, De Grey seemed doubtful; but in the last, the court were unanimous, that no action would lie, although the officer, if he knew the circumstances, might possibly be punishable for the contempt.

In last certainly no action.

But although such actions may be unfrequent, yet in strictness of law, an action of trespass will lie for arresting a privileged person, provided the writ on which such arrest was made be first *superfeded*, but not otherwise; for till then it will be a justification. Per Buller, *J. Tarlton v. Fisher*, Do. 677. *Parsons v. Lloyd*, 3 W. 341.

In first one will lie,

Such action must be brought against the party, not against the sheriff, or his officers. For it is settled, that no sheriff, nor his officer, is liable to an action for false imprisonment for arresting any privileged or protected person, as a certificated bankrupt, a feme covert, a peer, a discharged insolvent, and the like.—Ib. Nor for arresting an attorney, though the sheriff was served with a writ of privilege. *Croftley v. Shaw*, Blac. 1085. (The arresting of an ambassador, or his servant, properly registered agreeable to act of parliament, is an exception; for in such case, the bailiff would be liable by the statute 7 Ann.)

Against the party, not the officer; who is adjudged not liable.

(Exception as to Ambassadors.)

If, however, they should do any thing oppressive, after full notice of all the circumstances, an action on the case might, *perhaps*, be maintained against them. Ib. *Tarlton v. Fisher*, Do. 676.

Perhaps otherwise in cases of oppression.

But the general rule, with respect to sheriffs and their officers, is, that a sheriff is bound to execute process issuing out of a court of competent jurisdiction, and though there be no cause of action, or the process be erroneous, the sheriff is not responsible. Ib.

General rule as to sheriff's justification.

The chief object, as it has been observed, of a privileged person who has been arrested, is to obtain his *discharge*.

Discharge of persons privileged.

Ancient way.

The ancient way of any one availing himself of this privilege, was, generally speaking, by suing out his writ of privilege, which was dilatory and tedious.

The modern way.

The modern way of giving the same relief, is usually by a summary motion to discharge.

But the method to be pursued, must be governed by the nature of the case.

As to ambassadors and their servants.

Ambassadors, and their servants, may get discharged by *motion*; grounded, in the latter case, upon an affidavit of defendant's being actually in the service of such an ambassador, or minister, &c. and accompanied with a certificate from such minister, that such defendant is in his service, which affidavit must be formal, and circumstantial, and agreeable to the directions ante (B. 2. b.).

As to peers and members.

Peers and members of parliament, if arrested, will be discharged on *motion*.

Even though defendant should be created a peer after the arrest.

Feme covert.

So a feme covert, if arrested, may be discharged on *motion*.

Attornies, when to be discharged on motion.

Attornies, if they be arrested on process issuing out of the *same* court to which they belong, may be discharged on *motion*. *Wheeler's case*, 1 W. 298.

When by pleading their privilege.

But if an attorney of *one* court be arrested by virtue of process issuing out of *another*, he must then find special bail in such court, and plead his privilege. *Snee v. Humphreys*, 1 W. 306. *Mayor of Basingstoke v. Bonner*, Str. 864.

How privilege to be pleaded;

And this may either be pleaded with a *profert* of the writ of privilege, or without, as a mere matter of fact; in which last case it should be verified by an affidavit, as any other plea in abatement. The difference is, if it be pleaded with a writ and a *profert* thereof, defendant produces a writ, testifying that he is an attorney, or officer, and the plaintiff cannot deny the privilege; but if he plead it without such writ, plaintiff may deny the fact, and a *certiorari* must then be awarded to certify whether he

he be an attorney, or not. *Dillon v. Harper*, Sal. 545.
Thomce v. Lloyd, Ray. 336. *Cliffon v. Swezeland*, 7 Mod.
 106. *Tidd's Prac. B. R.* 50. N.

For the fact is to be tried by the *record*, and therefore And tried,
 such a replication must conclude to the record. *Forster*
v. Cale, Str. 76. *Barker v. Forest*, Ib. 532.

A plea of privilege cannot be pleaded after a special At what time to
 imparlance. be pleaded,

And in all cases, an attorney must plead his privilege ;
 nor is he entitled to his discharge, even by serving the
 sheriff with a writ of privilege ; for the sheriff cannot
 take notice of privilege, but it must be pleaded. *Crosley*
v. Shaw, Blac. 1085.

Formerly, when a bankrupt was arrested, and held to As to a certifi-
bail, who was entitled to his discharge, the method was, cated bankrupt,
 for the bail to surrender defendant, and then for him to how to get dis-
 apply to be discharged, upon an affidavit, stating the charged,
 facts of his having become bankrupt since the cause of
 action arose, and having obtained his certificate. But Ancient prac-
 now, where a bankrupt is clearly entitled to his dis- tice.
 charge, the court, to avoid circuity, will order an *ex- Modern,*
oneretur to be entered on the bail piece on motion made
 for that purpose, without the form of a regular surrender
 by his bail. *Martin v. O'Hara*, Cow. 824.

If he be arrested, but not held to bail, his discharge When on mo-
 may be effected by motion on his filing common bail. tion.

But this is a rule *nisi* in the first instance ; and it will Which is a rule
 be open to the plaintiff to shew any cause he thinks pro- nisi, and what
 per against it ; and if it appear, upon such cause shewn, may be shewn
 that the commission was fraudulently issued, or that de- for cause against
 fendant had concealed part of his effects, or had ob- it.
 tained his certificate surreptitiously, they will discharge
 the rule. *Sowley v. Jones*, Black. 725. *Robson v. Calze*,
Do. 228. *Vincent v. Brady*, C. B. Mich. 32 G. 3.

And should the court not choose, in such case, to de- Feigned issue di-
 termine the matter upon affidavits, they will direct a rected, if doubt-
 feigned issue to try the question. *Robson v. Calze*, Do. ful.
 228.

As to insolvent
debtors and fu-
gitives ;

How to get dis-
charged,

Discharged *insolvent debtors* and *fugitives* may, if wrongfully arrested, move the court for a rule to shew cause, why they should not be discharged on common bail, on producing their duplicate of such their discharge, as such insolvent debtor or fugitive ; and if no sufficient cause shewn, will obtain their discharge.

At what time.

And this, even after they have put in bail. *Baxter v. Overton*, Bar. 102. for they may be deemed in *custody* of their bail.

What cause may
be shewn against
the validity of
the duplicate.

But plaintiff, notwithstanding the duplicate, may shew cause against its validity ; as that, at the time defendant is said in the duplicate to have been abroad as a *fugitive*, he was abroad in the course of his trade, which is sufficient for court to discharge the rule. *Sheldon v. Foot*, Say. 308.

But in the case of *Norton v. Lutwidge*, Bar. 105. the court would not enter into the point, whether defendant was within the statute ; or whether, on the face of the duplicate, the sessions had exceeded their authority ; but said, that the quarter sessions were to determine as to the immediate liberty of the party, and afterwards the court, or a judge, were to discharge the defendant on producing his duplicate ; plaintiff, therefore, may put any point on trial, but defendant must not remain in *vinculis* till determination. But see 1 Barn. 420.

Such, then, is the consequence of arresting, and holding to bail, any person not liable to be arrested, whether by privilege, or otherwise ; such their remedy by action ; and such the general methods of obtaining their discharge. It need only further be observed, that in all cases not mentioned here, if any privileged or protected person be wrongfully imprisoned, and held to bail, the usual mode of procuring his discharge is, by application to the court for that purpose.

Having fully considered the various criterions by which an action may be distinguished to be bailable or not bailable, we proceed now with our main design, to shew the method of commencing and prosecuting suits in the respective courts; but as the mode of proceeding materially differs, according as the action requires special bail or not, and as this difference chiefly prevails in the PROCESS, that is to say, in the means used to compel the defendant to appear in court; we shall, for the sake of rendering the practice as intelligible as possible, treat of the process in each of these cases separately and distinctly, from the commencement of the suit until the declaration; at which point, the proceedings as it were meet, and are afterwards carried on in nearly the same uniform course of practice.

CHAP. III.

The Mode of proceeding when common Bail only is required, from the Commencement of the Suit to the Declaration.

Statutes relating thereto.

IF the action about to be brought be not a bailable action, or if it be *, and plaintiff does not wish to arrest defendant, and hold him to special bail, the mode of proceeding, to bring the defendant into court, is clearly pointed out by the following statutes: 12 G. 1. c. 29. (made perpetual by the 21 G. 2. c. 3.); the 2 G. 2. c. 23. (made perpetual by 30 G. 2. c. 19.); and the 5 G. 2. c. 27. (made perpetual by 21 G. 2. c. 3.)

The proceedings in actions not bailable, governed by different statutes.

By the 12 G. 1. c. 29. s. 1. in all cases where the cause of action shall not amount to the sum of 10l. or upwards, the plaintiff or plaintiffs shall not arrest, or cause to be arrested, the body of the defendant or defendants; but shall *serve* him, her, or them, *personally*, within the jurisdiction of the court, with a *copy of the process*.

Defendant must be personally served with process.

* Although the cause of action be bailable, yet plaintiff is not obliged to arrest defendant, and hold him to special bail; but he may decline making any affidavit, and by 12 G. 1. c. 29. s. 2. proceed by serving him with process, as directed by that statute in actions not bailable.

By

The Statutes relating thereto.

Indorsed with
attorney's name,

By the 2 G. 2. c. 23. s. 22. every copy of any writ or process that shall be served upon any defendant, shall, before the service thereof, be subscribed or indorsed with the name of the attorney or solicitor, written in a common legible hand, who shall be immediately retained or employed by the plaintiff in such writ or process.

And notice to
appear annexed.

By the 5 G. 2. c. 27. s. 4. upon every copy of such process to be served upon any defendant, shall be written, in words at length, in a common legible hand and character, an English notice to such defendant of the intent and meaning of such service, and desiring the party to appear on the day mentioned therein, and for which no fee or reward shall be taken; the form of which notice is prescribed in the act.

5 s. only to be
charged for ser-
vice.

By the same statute, s. 2. no attorney shall charge more than 5 s. for the making and serving a copy of such process on defendant.

If defendant
do not appear,
plaintiff may ap-
pear for him.

And by the statute, 12 G. 1. c. 29. s. 1. (first above-mentioned), if such defendant or defendants shall not appear at the return of the process, or within four days (now extended to eight by 5 G. 2. c. 27.) after such return, it shall be lawful for the plaintiff or plaintiffs, upon affidavit being made, and filed in the proper court, of the personal service of such process as aforesaid (which said affidavit shall be filed gratis,) to enter a common appearance, or file common bail for the defendant or defendants, and to proceed thereon, as if such defendant or defendants had entered his, her, or their appearance, or filed common bail.

A summary of
the above.

Such are the general directions given in the above statutes, for the regulation of the proceedings in all actions wherein special bail is not required, from the commencement thereof to the bringing of the party into court, i. e. to the declaration; the summary of which is, that "a copy of process duly indorsed or subscribed with the attorney's name, and with a notice thereunto annexed, requiring defendant's appearance in court at the time mentioned therein, is to be served personally upon defendant; and if the defendant do not appear accordingly, plaintiff may, upon an affidavit of such personal service of the copy of process, appear for him."

From

The Procefs and its Incidents, &c.

From this short statement of the proceedings, four things naturally present themselves to our observation: 1st, *The procefs* itself, with a copy of which defendant is to be served; its nature and incidents, as the indorsement, notice to appear, &c.: 2d, *The service* thereof: 3d, *The defendant's* appearance in pursuance of such procefs: 4th, Plaintiff's appearing *for* defendant in consequence of his neglect.

We shall therefore divide this chapter into the following sections; and consider

Sec 1. *The PROCESS and its Incidents, with a Copy of which Defendant is to be served.*

Sec. 2. *Of the SERVICE of a Copy of the Procefs on Defendant.*

Sec. 3. *Of Defendant's APPEARANCE according to Procefs.*

Sec. 4. *Of Plaintiff's appearing for Defendant according to the Statute.*

Sec. 5. *Of Defects and Irregularities in Procefs.*

SECTION I.

Of the Procefs and its Incidents; and herein

(A) The several Forms and Purposes of the Procefs.

(B) How to sue out the Procefs.

(C) The Notice to appear to be inserted therein.

(D) The Indorsement of the Attorney's Name thereon.

(E) Observations on the Nature, Extent, and Operation of the Procefs.

A. The several Forms and Purposes of the Procefs.

A.

The several forms of the bill of Middlesex, *latitat*, *non omittas*, &c, and of the *alias's* and *pluries*, ought, in strict

For the forms of the procefs.

How to sue out Process in B. R.

strictness of order, to be here inserted; but as they are, for the most part, so well known, and printed forms thereof may be so easily obtained by the practitioner, it was thought better to reserve them for a note in the appendix at the end of the volume, to which the reader may refer at his pleasure.

For the several forms, therefore, of the process, their respective purposes, and how the blanks in the printed [Appendix E.] forms are to be filled up, vide [Appendix E.]

B.

B. How to sue out the Process.

(B 1.) *In King's Bench.*(B 2.) *In Common Pleas.*

What the first process in both courts is.

It has been already observed (*ante* Ch. I.), that in all actions between common persons (except where the proceedings are by special original in either court, or by *original quare clausum fregit* in C. B. for which see *post* Ch. V.), the first process in the Court of King's Bench is, if the defendant live, or is to be served, in Middlesex, a bill of Middlesex; if elsewhere, a *latitat*; and that in the Common Pleas, let the defendant live where he may, the first process is a *capias*.

How to sue it out.

The mode of suing out such process respectively, is as follows:

Memorandum of warrant.

The first thing necessary to be done *in both courts* is, to procure a *memorandum*, or minute of the warrant, to prosecute, on a 2s. 6d. stamp, agreeable to statute 25 G. 3. c. 80. See the form thereof, and remarks thereon, *ante* (Introduct. Observations, D 3.).

Where to be had.

These memorandums may either be bought at the law stationers, or when the process is carried to be signed may be generally had of the officer who signs the same, price 2s. 7d.

The *præcipe*.

The next thing is, to make out a *præcipe*, which is a mere note or abstract, written upon a slip of unstamped paper, containing the nature of the process; as *bill, lat. &c.*
the

How to sue out Proceſſs in B. R.

the names of the parties, the time it is returnable, and the name of the attorney retained. This *præcipe* is left with the officer who ſigns the proceſſs; the uſe of it is, 1ſt, As an order or warrant to the officer for ſigning the proceſſs; and 2d, As inſtructions to him to make an entry thereof, which is always done in a book, or on rolls, kept for that purpoſe.

Its nature.

Its uſe.

The form of the *Præcipe* is as follows:

Its form for bill of Middleſex and latitat.

Bill of Middleſex.	Latitat.
Middleſex. <i>Bill for Joſeph Sims againſt James Davis, returnable on Tueſday next after eight days of St. Hilary.</i>	Surry. <i>Latitat for Joſeph Sims againſt James Davis, treſpaſs returnable on Tueſday next, after eight days of St. Hilary.</i>
Thomas Smith, attorney.	Thomas Smith, attorney.
January 21, 1792.	January 21, 1792.

Capias in C. B.

For capias.

Middleſex to wit. *Capias for Joſeph Sims againſt James Davis, treſpaſs at Weſtmiſter, returnable in eight days of St. Hilary.*

Thomas Smith, attorney.
January 21, 1792.

Having procured the memorandum of warrant*, and prepared the *præcipe*, which is neceſſary in both courts, proceed as follows:

(B 1.) *In the King's Bench.*

By Bill of Middleſex.	By Latitat.	(B 1.)
Get a blank bill, which may be bought at the ſtationers, or had at the bill of Middleſex office; fill it up; take the bill, <i>præcipe</i> , and memorandum of warrant, to the bill of Middleſex office, and the officer will ſign it, for which, if in Term, pay 6d.; if in vacation, 10d. Leave the <i>præcipe</i> and memorandum of warrant at the office.—The bill of Middleſex is not to be ſealed.	Get a blank writ, to be bought at the ſtationers, or had at the K. B. office; fill it up, carry it, with the <i>præcipe</i> , and memorandum of warrant, to the King's Bench office to be ſigned; pay the officer for ſigning 2s. 6d.; leave the <i>præcipe</i> and memorandum of warrant with him. Then carry writ to Seal Office; pay for ſealing 7d.	How to ſue out proceſſs. Bill of Middleſex. Latitat.

* If a bill of Middleſex has been, in fact, ſued out, and afterwards it be found neceſſary to ſue out a latitat, the old memorandum of the warrant which was got for the bill of Middleſex, will be ſufficient; only add to the *præcipe* for the latitat, "Bill of Middleſex ſued out the day of 1792."

By

How to sue out Process in B. R.

Alias bill.
Alias capias.

By alias bill.] If defendant be not served with the bill of Middlesex before the return thereof, sue out an alias bill.

By alias capias.] If the defendant be not served with the latitat before the return thereof, sue out an alias capias.

Pluries bill.
Pluries capias.

By pluries bill.] If the alias be not served before the return, sue out a pluries bill.

By pluries capias.] If the alias be not served in time, sue out a pluries capias.

The mode of suing out the alias and pluries is the same as the bill of Middlesex, only in the præcipe for the office, add the word alias or pluries bill, and also insert the date when the first bill of Middlesex issued. Pay no more than 2d. for signing, whether in Term or vacation. They are not sealed.

The alias and pluries capias are sued out in the same way as the latitat, only nothing is paid for the signing, but 7d. for the sealing.

In the præcipe for the office say, alias or pluries capias, instead of latitat, and insert the date when the latitat issued.

Non omit. bill.
Non omit. cap.

Non omittas bill.] If defendant is to be served in any liberty, sue out a non omittas bill; and if that be not served in time, an alias and pluries non omittas. They are sued out in the same way as the bill of Middlesex, and the same fees paid; only in the præcipe call it "non omittas bill of Middlesex."

Non omittas capias.] If defendant is to be served in any liberty, sue out a non omittas capias; and if that be not served in due time, an alias and pluries non omittas. These are sued out in the same way as the alias capias or latitat; only in præcipe, say, "Surrey non omittas capias." Pay for signing 2s. 6d. sealing 1s. 2d.

Sued out in first instance.

The return of a mandavi ballivo, which was formerly necessary, is now presumed and dispensed with; and the non omittas bill, or capias, may be sued out in the first instance, without any previous writ or return.

County Palatine.

County Palatine.] If the latitat must be served on defendant in any County Palatine, it is sued out as a common latitat, though different in form; only in præcipe, say

County Palatine of Chester, latitat, &c.

Cinque Ports.

Cinque Ports.] No difference in suing out writs for Cinque Ports; except in præcipe, say—Cinque Ports, latitat, &c.

For

How to sue out Process in C. B.

For the forms of all the above writs, see [Appendix E.] [Appendix E.]

If, after having sued the *pluries* bill, or *pluries capias*, or *pluries non omittas*, as the case may be, defendant still be not served before the writ is returnable, then sue out another *pluries* in the same way as the last, and so continue them from Term to Term, still putting in the *præcipe* the date when the *first* process issued.

Pluries writs continued from term to term.

It is said, in some books, that *pluries* writs can only be continued for four Terms, at the end of which a new bill of Middlesex or *latitat* must be sued out; but that is a mistake, for a new bill of Middlesex or *latitat* is only necessary if plaintiff *lies by* for four Terms.

New writ only, if plaintiff lies by four terms.

(B 2.) *In the Common Pleas.*

(B 2.)

Having procured memorandum of warrant, and prepared *præcipe* as above, (B) take the *præcipe* and memorandum of warrant to the proper filazer, who will make out the *capias*, and sign the same; and, at his leisure afterwards, procure the original writ (a) from the curfitor to warrant it, which he returns, and files of course; (Appendix C.) pay him for signing *capias* 2s. 6d. sealing 7d.

Capias.

[Appendix C.]

If defendant cannot be served before the return thereof, sue out a *capias* by continuance (b), which is precisely the same as the

Capias by continuance.

(a) The filazer enters the *præcipes* on a roll, and at the end of the Term delivers the roll to the curfitor, who makes out the originals from them all at once, to be filed with the *custos breviarum*. These originals are nothing more than printed blank forms of the *clausum fregit*, filled up by the curfitor, with the parties names, &c. without being stamped or sealed, and filed with the curfitor, *pro forma*, to give the court jurisdiction. But these will not do if a writ of error is brought after judgment by default; for in such case a real special original, as was formerly necessary in the first instance, must be sued out, which is obtained by petition to the Master of the Rolls. But if it be after verdict, the want of original is cured by the statute of *jea fails*. Here, then, may be observed, a most essential and striking difference in the proceedings of this court; for although, legally speaking, all proceedings herein are by original; yet the student and practitioner must take care not to confound them, but ever to keep in mind the distinction between the proceedings by *special original* and by *common capias quare clausum fregit*. For a fuller account whereof, vid. (post, ch. v. and Appendix C.)

(b) So called, because it is continued on the roll by the filazer from the time the first writ issued, and so on from Term to Term, until the defendant is served.

first

How to sue out Process in C. B.

first capias, only put in the præcipe, the words capias by continuance, and also the date when the first writ issued. If the capias by continuance be not served in time, sue another capias by continuance, and so on from Term to Term; pay signing these writs 10d. sealing 7d.

Non omittas capias.

Non omittas capias.] *If defendant lives, or is to be served in a liberty, then sue out a non omittas capias, in same manner as common capias, only in præcipe call it "non omittas capias."—It may be sued out in the first instance; if not served in time, sue out an alias and pluries non omittas capias, always putting in præcipe the date when the first writ issued.*

County palatine.

County Palatine.] *If capias wanted for County Palatine, it is sued out as a common capias; only say in præcipe,*

County Palatine of Chester, capias for, &c.

Cinque ports.

Cinque Ports.] *No difference in suing out capias for Cinque Ports; only say in præcipe, "Cinque Ports, capias for, &c."*

☞ Such is the mode of suing out process in the respective courts of King's Bench and Common Pleas.—A copy of this process is to be served on defendant; but it is previously necessary, that to such copy of the process, let it be what it may, whether bill of *Middlesex*, *latitat*, or *capias*, there should be annexed, or subscribed, a written notice to the defendant to appear; and also the name of the attorney retained by plaintiff indorsed thereon.—We will consider, therefore,

(C) The Notice to appear, to be inserted in the Copy of such Process.

(C 1.) *The Intent and Form thereof.*

(C 2.) *How Notice should be filled up.*

(C 3.) *In what Cases necessary.*

(C 1.)

By the 5 G. 2. c. 27. s. 4. upon every copy of such process to be served upon any defendant, shall be written, in words at length, in a common legible hand and character, an *English* notice to such defendant, of the intent

Of the Notice to appear.

intent and meaning of such service, to the effect following, viz.

A. B. You are served with this process to the intent, that you may, by your attorney, appear* in his Majesty's court of at the return thereof, being the day of (as the case shall happen to be), in order to your defence in this action.

Form of notice,

And for this notice no fee or reward shall be demanded or taken.

There are only three blanks in the above form to be filled up; first, the name of the party to whom it is addressed; second, the court in which he is to appear; third, the day on which he is to appear.

(C 2.)

How to fill up the notice.

As to the first, the name of the defendant must be mentioned in the notice; nor is it sufficient merely to say, you are served, &c. *Behema v. James*, 1 Wil. 104. *B. R. Worgman v. Plank*, C. B. T. R. 100.

1st, As to the name of the defendant.

If there be several defendants, they must all be named.

And they should be accurately named; for if the name in the notice differs from the name in the process, it will be bad. *Simpson v. Claypham*, P. R. 348. *Cromwell v. Goodwin*, Bar. 409.

As to the second, the name of the court in which the action is brought, either *King's Bench* or *Common Pleas*, should be properly inserted.

2d, As to the name of the court.

As to the third point, viz. the day on which he is to appear; it should, perhaps, strictly be the day of the month on which the return day of the process exactly falls; as, supposing the return in a common capias to be in eight days of St. Hilary, the notice should be thus: "at the return thereof, being the 20th day of January."

3d, As to the day on which defendant is to appear.

* If it be against husband and wife, say, for yourself and Mary your wife, or at her christian name may be.

G

And

Of the Notice to appear.

Must be the return day, though Sunday.

And this, although the 20th of January should fall on a Sunday. *Alsep v. Bagot*, P. R. 346. *Jenner v. Oatridge*, ib. For if it were made the 21st, it would be bad. *Green v. Watkins*, ib. 347.

The reason thereof,

The reason of this practice, of giving notice to appear on the Sunday, per Ld. Mansfield in the case of *Swann v. Broome*, Bur. 1600. is, "that in ancient times the courts "used to sit upon Sundays; whilst they did so, the notice "must follow the practice then in use, and must of consequence be given for appearing on the Sunday. But "now, that old practice of their actually sitting upon "Sundays, being altered, and at an end, these notices "must necessarily relate to the Monday, when the courts "do sit, and therefore the defendant cannot be misled by "having notice given him to appear on the Sunday."

Reason not satisfactory.

But, with due deference to such authority, this reason does not seem fully satisfactory; because, first, the courts did not sit on Sundays, at the time when the above act passed, namely, the 5 G. 2., nor long before; and therefore there was no such practice then in use for the notice to follow; and, secondly, the spirit, and indeed the letter of the act, is clearly otherwise; for it directs, that the plaintiff shall give defendant notice of the intent and meaning of the service; the intent of which cannot now be for defendant to appear in court on a Sunday.

Why.

In C. B. no ice held good if agreeable to the fact, though not on the return day.

The court of Common Pleas, in a late case, were of opinion that the notice was good, though not made for the defendant to appear on the exact return day, but agreeable to the fact. Defendant was served with a *clausum fregit*, returnable in 15 days of Easter, (i. e. the 8th of May;) but the notice to appear was thus: *at the return thereof, being the 11th day of May 1791*, (i. e. the *quarto die post*;) and upon shewing cause why proceedings should not be set aside for irregularity, the court said, they were clearly of opinion, that the notice to appear on the *quarto die post* was good, that being the day when, in point of fact, the defendant was to appear. *Summer v. Brady and others*, C. B., T. R. 630.

There is a N. B. in the report of this case, that the old practice of giving notice to appear on the *Effoin* day, (the

Of the Notice to appear.

(the return of the process) is not done away by this determination.

Clearly not; but as the practice now stands, the day in the notice of a *capias* may be made either the actual return day, as mentioned in the writ; i. e. the *essoign* day, or the day, in *fact*, when defendant is to appear, viz. the *quarto die post*.

May be either the *essoign* day or *quarto die post*.

Formerly the courts held it necessary for the notice to specify the year as well as the day of the month; or to add the word "instant," or "next." *Wingfield v. Beard*, Bar. 419. *White v. Washington*, P. R. 347.

No occasion to particularise the year.

But now these cases are exploded, and it is held sufficient to insert the day of the month, as the 26th of June, without saying "instant," "next," or expressing the year. *The Weaver's Company, qui tam, v. Forest*, Str. 1233. *Elliott v. Parrot*, Bar. 425.

The day of the month sufficient.

A notice is most unquestionably necessary, by the stat. 12 G. 1. & 5 G. 2. vid. ant. p. 74. in all cases where the cause of action shall *not* amount to 10l.; and if omitted, proceedings will be set aside.

(C 3.) In what cases notice is necessary. In all actions under 10 l.

It also was held necessary in C. B. in *all* cases where process is served, although the cause of action be above 10l. *Longbotham v. Knapp*, Bar. 404. *Atwood v. Meredith*, P. R. 349. S. C. Cooke's Rep. 143. *Cock v. Turner*, ib. 100.

And in C. B. in actions above 10 l. if process served.

But in a later case, of *Willis v. Lewis*, in B. R. 1 Wil. 22. it was resolved, *per cur.* that there was no occasion to put the notice to appear, at the bottom of the process, according to stat. G. 2., it being above 10l.

But not so in B. R.

And, in a late ingenious publication, upon the practice of the court of King's Bench, it is said, in two places, "where the cause of action amounts to 10l. or upwards, and no *affidavit* is made thereof, a notice is unnecessary." Tidd's Pract. 97. 30.

Here then the courts differ. I must confess, that the practice of the Common Pleas, in this respect, appears

Q. As to the practice of B. R.

Of the Notice to appear.

to me, most agreeable to the letter and spirit of the acts. The statutes of 12 G. 1. c. 19. & 5 G. 2. c. 27. being in *pari materia*, and the latter having passed, specifically, for the purpose of explaining and amending the former, must be considered together, they must be looked upon, and construed as *one* act. Now, by the 5 G. 2. s. 4., a notice is positively directed to be written upon the copy of every process served on any defendant.

But it may be said, that by that act this clause can only relate to proceedings in actions *under* 10l. Be it so; it must then be looked upon as a *necessary* part of the proceedings, as *directed* by the 12 G. 1. in all cases where the cause of action does *not* amount to 10l.

Now, by the second sect. of that act, it is positively enacted, that if any writ or process shall issue for the sum of 10l. *or upwards*, and *no affidavit* and indorsement shall be made, the plaintiff shall not proceed to arrest the defendant, *but shall proceed* IN LIKE MANNER, as is by *that act directed* in cases where the cause of action does *not* amount to the sum of 10l. It would seem, therefore, as if a notice were necessary in both cases, more especially when the intent and spirit of this law are considered; for it is a law in favour of defendant, to put him upon his guard, to explain to him the nature of the process, and warn him of his duty to *appear*. If, then, the legislature thought fit thus to caution defendant in matters of little moment, in actions under 10l., a *fortiori*, is this caution necessary in cases of greater magnitude? The only difference in aailable writ, is the *action*; but that by no means supplies the place of the notice.

D. **D.** Of the Indorsement of the Attorney's Name on the Process.

Indorsement directed by statute.

By 2 G. 2. c. 23. s. 22. it is enacted, that every copy of any writ, or process, that shall be served upon any defendant, shall, before the service thereof, be subscribed or indorsed with the name of the attorney, or solicitor, who shall be *immediately retained*, or employed by the plaintiff in such writ or process. See *ante*, p. 74.

Indorsement of Attorney's Name.

It was formerly held, that the omission of the attorney's name did not vitiate the process, and proceedings were refused to be set aside upon that account. *Fawkes v. Jay*, P. R. 440. *Blackhall v. Gould*, ib. 441. Bar. 407.

Omission formerly did not vitiate process.

But these cases were previous to the passing of the 12 G. 2. c. 13.; which, though it only immediately relates to *bailable* writs, on which warrants to arrest issue, yet it shews the wish of the legislature to enforce this practice of the indorsement; and since that time such indorsement has been deemed necessary by both courts. In *C. B. Chapman v. Ryall*, and others. Bar. 415. In *B. R. Loft. 58. & Oppenheim qui tam v. Harrison*, Bur. 20.; and for want thereof proceedings may be set aside.

But now it does.

Further, it must be the name of the attorney *actually* retained; for although, in the last case, it appeared that there was a real attorney's name thereto, yet it was put without any authority from him by the plaintiff's attorney, against whom, for so doing, the court granted an attachment. *Ib.* Bur. 20.

It must be the real attorney's name.

The general and proper way is, not only to indorse the attorney's name thereon, but also the day and year when the process issued; but this indorsement forms no part of the process; and though the time indorsed be absurd, and contradictory to the *teste*, yet if the latter be right, it is sufficient. *Coleby v. Norris*, 1 Wil. 91. *Green v. Rennett*, 1 D. & E. 656.

How process generally indorsed.

Indorsement no part of process.

The process having been thus formally sued out, as ante B. and a written notice to appear, subscribed or annexed thereto, and the attorney's name indorsed thereon, it is completed for service upon the defendant; but before the treating thereof, we will make a few observations on the nature, extent, contents, and operation of this process.

C. Observations on the Process.

- (E 1.) *The Nature and Extent thereof.*
- (E 2.) *How to be directed.*
- (E 3.) *Of the Description of Plaintiff therein.*
- (E 4.) *Of the Description and Number of Defendants.*

Observations on Process.

- (E 5.) *How Cause of Action to be expressed.*
 (E 6.) *Of the Teste and Return.*
 (E 7.) *How subsequent and former Process should agree.*
 (E 8.) *When Bill of Middlesex, Latitat, and Capias, may issue; and whether to be considered the commencement of a Suit, or as Process.*
 (E 9.) *Of pleading the Latitat and Capias, and the Necessity of the original Bill, or original Writ.*
 (E 10.) *Of craving Oyer of the original Writ.*

(E 1.)

(E 1.) *Nature and Extent of Process.*

Nature and extent of process.

The bill of Middlesex is a *precept*, not a writ, having only a return, and no direction nor *teste*; nor can it run over all England, but is confined to the county of Middlesex.

Bill of Middlesex.

Extent thereof.

So that if defendant be served with, or arrested upon, a bill of Middlesex, in the city of London, or out of the county of Middlesex, proceedings will be set aside. *Borman v. Bellamy*, 1 D. & E. 187. *Devenege v. Dalby*, Do. 384.

But if it be doubtful whether the spot where defendant was served be in London or Middlesex, it shall be good service. *Drew v. Marriot*, 1 Wil. 77.

Latitat and capias.

A latitat and capias are sometimes considered in the nature of original writs, but sometimes only as process. Vide post (E 8.).

Extent of latitat.

A latitat is not confined to any particular county, but may be served in any. *Borman v. Bellamy*, 1 D. & E. 187.

Runs into Wales

Although, after long argument, it was held, that a latitat did not run into Wales (*Lampley, and others, v. Thomas, and others*, 1 Wil. 193.); yet it has since been determined that it does. *Penry v. Jones*, Do. 213.

And to counties palatine.

The latitat and capias extend to a county palatine, and are immediately directed to the chancellor; for the meaning of the expression, *breve domini regis non currit*, is not, that the king's writs are not to be executed in such places, but that

Its Nature and Extent, &c.

that the court cannot direct them immediately to the sheriff.

(E 2.) *How to be directed.*

(E 2.)

The bill of Middlesex has no direction.

The latitat and capias are generally directed to the sheriff of that county where defendant is likely to be found.

How process to be directed generally.

But sometimes a particular special direction is necessary; as if the sheriff be a party, the writ would be bad if directed to him, although it were mere process in a common action. *Weston v. Coulson*, Black. 506. But it should in such case be directed to the coroners; and if the coroners be parties also, it should be directed to two persons, either named by the court (3 Black. Com. 354.), or by the master (Imp. 160.), called *elizors*. Again the writ must be specially directed, if it is to be executed in any county palatine, or the cinque ports, or the like. For the forms of these particular directions, vide [Appendix E.]

How, if sheriff be a party and the like.

[Appendix E.]

(E 3.) *Of the Description of Plaintiff therein.*

(E 3.)

It is not necessary to insert in the process, on what account, or in what right, the party sues; so that executors, administrators, assignees, and the like, need not be described as such in the process; but it may be generally to answer A. B. in a plea, &c.; and they may afterwards declare as executors, &c. or plaintiff, upon such general process, may declare *qui tam*. *The Weavers' Company v. Forest*, Str. 1232. *Lloyd, qui tam, v. Williams*, Black. 722. So, on the other hand, it was formerly held, that if the process were particular to answer A. B. as executor, administrator, or the like, plaintiff might have declared generally, and not as executor or administrator. Not so, however, if the action had been a *qui tam* action; for then, if the process were *qui tam*, plaintiff could not have declared generally.

Of the description of plaintiff in process.

Need not state in what right he sues; but process may be general, and plaintiff afterwards declare in special character;

And the reason given for this distinction was, that though the plaintiff may stile himself executor, or give himself any other superfluous description in the process, and

Observations on Process.

declare otherwise; yet this will not hurt, for the demand is the same; but in the case where the process is *qui tam*, and the declaration general, the very nature of the demand is altered, the process importing a demand to the king and plaintiff, and the declaration a demand to the plaintiff only. *Lloyd v. Williams*, Black. 722. *Canning v. Davis*, Bar. 494.

This distinction, if closely examined, does not appear very satisfactory; and, indeed, has been since over-ruled in the case of *Meggs*, assignee, v. *Ford*, E. 25 G. 3. Imp. 172.

But not vice
versâ.

Where the process being to answer plaintiffs as assignees of a bankrupt, and declaration generally in their own right, proceedings were set aside; and it was held, that plaintiffs could not declare generally on process sued out in a special character.

The present practice therefore seems to be, that, upon general process, plaintiff may declare in a special character, but not vice versâ.

(E 4.)

(E 4.) *Of the Description and Number of Defendants.*

Of the description
and number
of defendants.

The process should express the defendant by his name of baptism and surname; and if more persons of the same name, a proper distinction should be made, as *elder* or *younger*, &c.

Only four in a
writ.

It need not be
a joint cause of
action.

No more than four defendants must be put into one writ: but it is not necessary that it should be a joint cause of action, because four are inserted; for plaintiff may join four defendants in a writ for four different and several causes of action, and afterwards declare against all, or any of them, as he pleases; the writ being thus considered as mere process to bring the parties into court. *Roe v. Cock*, 2 D. & E. 258.

(E 5.)

(E 5.) *How Cause of Action to be expressed.*

Of stating the
cause of action
in process.

It is clearly not necessary in common process, where no special bail is required, to state the particular cause of action: in the Commons Pleas the *capias* is general where-
fore

Its Nature and Extent, &c.

for he broke the close: and in the King's Bench it is as general to answer plaintiff in a *plea of trespass*, let the cause of action be, in fact, what it may. *Foster & Bonner*, Cow. 455. [See *Appendix B. & C.*]

Need not be shewn.

[*Appendix B. & C.*]

We have already shewn, that as the court of King's Bench originally got cognizance of the cause, upon the supposition of a *trespass* having been committed (see Chap. I.), it was formerly held *necessary* to alledge a *trespass* in the process; but the jurisdiction of this court being, at this day, firmly established, it is not so strictly insisted upon; and in cases where the bill of Middlesex was to answer plaintiff in a *plea of debt* instead of *trespass*, the process was either held good or allowed to be amended. *Barber v. Lloyd*, 2 D. & E. 513. *Cox v. Mundy*, Black. 462.

Process not bad, though to answer plaintiff in a *plea of debt* instead of *trespass*.

But there is one instance where the cause of action must be inserted in the process, though special bail is not required; which is, in an action against bail upon their recognizance, when the following *ac etiam*, by a particular rule of the court of B. R. (E. 15 G. 2.) must be added after the words, in a *plea of trespass*: "And also to the bill of the said Joseph to be exhibited against the said James in a *plea of debt* on recognizance, according to the custom of the court of our lord the king before the king himself," if it be a *latitat*; but if a bill of Middlesex, say, "According to the custom of our court before us."

Should state the cause of action, if against bail on recognizance.

(E 6.) *Of the Teste and Return.*

(E 6.)

A bill of Middlesex is no writ, and has no *teste*.

Of the teste and return of process.

Every *latitat capias*, &c. must bear teste in term, otherwise they are void. *Hart, assignee, &c. v. Hingeston*, Bur. 2588. Black. 683.

If therefore they be sued out in vacation, they are to be tested the last day of the preceding term. *Johnson v. Smith*, Bur. 964. *Bennet v. Sampson*, Bar. 407.

All process must be tested,

If sued out in term, they are generally tested the first day of such term, unless it be an *alias* or *pluries* writ; then its

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its teste should be on the return day of the *last* writ ; and the clerk should subscribe under it the term when the first writ issued. *Reg. Tr.* 1656.

And made returnable in term.

As writs are tested, so must they be made returnable in term ; otherwise, void. *Mills v. Bond*, Str. 399.

Bill of Middlesex or latitat on day certain ;

A bill of Middlesex or latitat, with their respective aliases, &c. must be returnable upon a day *certain* or particular return, not on a general return day. Vid. ante *Intro. Observations*, B 3.

Which may be the next day after it is sued out,

There are no certain number of days in which the return must be made: a bill of Middlesex or latitat may be returnable the next day after it is sued out. *Loving v. Avery*, Str. 917. But not the same day, because the process is returnable *de die in diem*. *Green v. Rivet*, Ray. 772.

Capias ought strictly to have fifteen days between teste and return, if not, it is no irregularity, but may be amended.

But in every *capias*, the proceedings being founded upon an original, the return should be made on a *general* return day ; and there should perhaps, strictly speaking, be fifteen days between the teste and return. Formerly, indeed, it was even held error if otherwise, and not merely an irregularity. *Williams v. Faulkner*, Bar. 409. Afterwards the court deemed it only an irregularity, and set aside the proceedings. *Atkinson v. Taylor*, 2 Wil. 117. The next step was, to allow the writ in such case to be amended. *Carty v. Asbley*, Black. 918. Ib. 3 Wil. 454.

And now, although there be not fifteen days between the teste and return, the court will not take notice thereof ; nor even grant any thing upon a motion on that account, but allow it to be amended, as a matter of course. *Bourchier v. Whittle*, C. B. T. R. 291.

It is to be observed, however, that this practice only relates to proceedings by *common capias quare clausum fregit* ; which is a writ founded upon an original, *supposed* only to be previously issued, and not to proceedings by *special original*. For which, see Chap. V.

Process bad, if a term intervene.

In all process, in either court, a term must not intervene between the teste and return, as the cause would be then

Its Nature and Extent, &c.

then out of court, and the writ absolutely void; and if defendant were arrested thereon, an action of false imprisonment would lie against the plaintiff in the action, though not against the officer. *Parsons v. Lloyd*, Black. 846. S. C. 3 Wil. 341.

If it be tested in the wrong year of the reign, as the 31st instead of the 32d, it is irregular. *Taylor v. Nickolls*, Bar. 409. Or if tested in a wrong year.

Formerly it was held necessary for the filazer to put his name to the *capias*; but there is now no occasion for it. *Frost v. Eyles*, C. B. T. R. 120. No need of filazer's name to *capias*.

(E 7.) *How subsequent and former Process should agree.*

(E 7.)

All *alias* and *pluries* writs should correspond with the first writ sued out; for if the *latitat* be against the defendant by one Christian name, and the *alias* by another, and the plaintiff afterwards proceed, the court will set aside the proceedings for irregularity. *Corbet v. Bates*, 3 D. & E. 660. Subsequent and former process should agree.

(E 8.) *When Bill of Middlesex, Latitat, and Capias, may issue; and whether to be considered the Commencement of a Suit or as Process.*

(E 8.)

Process may be sued out in vacation, but must be tested of the preceding term. *Hart, assignee, v. Hingston*, Bur. 2588.

When bill of Middlesex and *latitat*, &c. may issue;

So a *latitat* may sometimes be issued before any cause of action has accrued; because, generally speaking, in all common cases, a *latitat*, by the practice of the court, is considered merely as a *process* or *summons*; and the declaration is deemed the commencement of the suit, and is what is meant by the exhibiting of the bill. See [*Appendix G.*]

And whether to be considered as commencement of a suit, or as process.

In common cases as process.

The

Observations on Proceſs.

Time of iſſuing
immaterial,

The time of iſſuing the latitat, therefore, is immaterial, for if any cauſe of action accrues at any time, *ante exhibitionem billæ* [Appendix G.], i. e. before the filing of the declaration, though, after the ſuing out of the proceſs, it is ſufficient. *Fofter v. Bonner*, Cow. 454. *Johnſon v. Smith*, Bur. 950.

If cauſe of ac-
tion accrues be-
fore declaration
filed;

But this is to be underſtood, with this reſtriction; namely, that the declaration is actually filed at the time when, in ſtrictneſs of law, it ought to be filed.

Which ought to
be ſame term
writ is return-
able.

By the practice of the courts, indeed, the plaintiff may declare at any time within the ſecond term after the writ is returnable; but that is merely an indulgence, and the declaration muſt ſtill be intituled *as* of the term when the proceſs *was* returnable. Therefore, if proceſs be ſued out, and no cauſe of action accrue until *after* the term when the writ is returnable, although before the expiration of the time allowed for plaintiff to declare in, and before he actually has declared, it will be of no avail; nor will plaintiff be aſſiſted by intitling the declaration of the ſubſequent term. *Smith v. Muller*, 3 D. & E. 624.

In many caſes
latitat conſidered
the commence-
ment of a ſuit.

There are various caſes, however, in which the latitat is not to be taken as mere proceſs, but as the *commencement* of the ſuit; and theſe are, *whenever the actual time of ſuing out the writ is material, and the juſtice of the caſe requires that it ſhould be preciſely aſcertained.*

Where the time
of ſuing out writ
is material;
as in caſes of pe-
nal actions, ten-
ders, ſtatutes of
limitations, and
the like.

As in penal and all other actions, for inſtance, where a limited time is fixed for the commencement of the ſuit, and which time expires in a vacation, if a latitat be ſued out in that vacation, though long after ſuch time has expired; yet, by being *teſted* as of the preceding term, it would appear as if it had iſſued in due time. So it might be with the ſtatutes of limitation.

In like manner a tender, made in *vacation*, and, in fact, *before* any action brought, if a writ were ſued out in that vacation, would appear by the teſte of the writ, being of the preceding term, to have been made after the bringing of the action. Again, if two actions be brought againſt defendant for the ſame offence, it may be material to ſhew the priority of one of the actions. Many other inſtances

Its Nature and Extent, &c.

instances may be adduced of the like kind ; but it is sufficient to say, that in the above, and in all other cases where the merits of the cause turn upon the exact time when the writ was sued out, that exact time may be shewn in the pleadings, or sometimes given in evidence, contrary to the *teste* of the writ, though a matter of record, for *factio cedit veritati* ; and although the fiction cannot be contradicted, so as to invalidate the writ, yet it may for the purpose of establishing truth and administering justice.

The exact time of issuing it may be shewn ;

In all such cases the *defendant* is entitled, as well as the plaintiff, to shew the true time of the writ issuing, if it be to his advantage so to do. The leading cases on this head, and in which the whole of the above doctrine may be found, are, *Johnson v. Smith*, Bur. 950. *Foster v. Bonner*, Cow. 454. *Wood v. Newton*, 1 Wil. 141. *Morris v. Pugh*, Bur. 1241. *Combe v. Pitt*, Bur. 1423. *Mostyn v. Fabrigas*, Cow. 178.

And defendant may do this as well as plaintiff.

But although process may be sued out, it is not, nor ever was allowed (even before any affidavit was necessary) to arrest the defendant before cause of action. *Hanway v. Merry*, Vent. 28. Bur. 967. And an original, or attachment of privilege, ought not to bear date before cause of action, Bur. 967.

Defendant must not be arrested before cause of action, nor original be tested.

The *capias* is considered equally with the *latitat*, either as process or as the commencement of a suit, the same distinction prevails, and the above doctrine applies. Do. 62. N. *Leader v. Moxon*, 2 Black. 924.

The above doctrine equally applies to the *capias*.

(E 9.) *Of pleading the Latitat and Capias, and the Necessity of the original Bill or original Writ.*

(E 9.)

As it is now settled that a *latitat* may be sued out in the first instance ; so it may be pleaded as in a replication to statute of limitations and the like, without shewing any bill of Middlesex. *Hollister v. Coulson*, Str. 550. *Johnson v. Smith*, Bur. 961.

Of pleading the *latitat*, &c.

In like manner it is sufficient to shew a *capias* in C. B. which every body understands to be now the commencement of a suit there ; and that the court always intends that

No occasion to shew original bill or original writ.

Of the Service of Procefs.

that an original has regularly issued whereupon the *capias* is grounded, so that the *capias* is deemed sufficient evidence of such original. *Leader v. Moxon*, Black. 925.

Want thereof cured after verdict, though not after judgment by default.

The want of an original bill, or original writ, is cured after verdict. *Foster v. Bonner*, Cow. 455. And although by the statute, 4 Ann, c. 16. they are still necessary in case of judgment by default; yet, if error be brought, they may be afterwards obtained to support the judgment.

(E 10.)

(E 10.) *Of craving Oyer of the original Writ.*

Of craving oyer of original.

Formerly much delay and expence were occasioned by defendants craving *oyer* of the original writ, in order to set it out upon the record, and plead any variance, omission, or the like; but this practice is now wholly discontinued, and it is a settled rule in both courts, that if defendant craves *oyer* of the writ, no notice need be taken thereof, but plaintiff may sign judgment as for want of a plea. *Boats v. Edwards*, Do. 227. B. R. *Ford v. Burnham*, Bar. 340. C. B.

SECTION II.

Of the Service of Copy of Procefs on Defendant.

Of the service of the procefs.

It has already been shewn, in the beginning of this chapter, that, by the 12 G. 1. c. 29. whenever the cause of action does not amount to 10 l. or if it does, and plaintiff makes no affidavit thereof, a copy of the process must be served *personally* upon the defendant; the form, nature, and effects of which process, has also been fully treated of; it therefore only remains, in this place, to consider

3.

1. What shall be deemed a good and effectual Service according to the Statute; and herein

(A 1.) *Of the Copy of Procefs to be served.*

(A 2.) *The Person by whom it is to be served.*

(A 3.)

Of the Service of Process.

(A 3.) *The Manner in which it is to served.*

(A 4.) *The Time when it is to be served.*

(A 5.) *In case the Process be against several Defendants, or against Husband and Wife.*

(A 6.) *Of the Punishment of Defendant, if he treats Process with Contempt.*

(A 1.) *Of the Copy of Process to be served.*

(A 1.)

A complete and true copy of the whole process must be served. *Cutcliffe v. Standish*, Prac. R. 354.

Of the copy of the process.

If the proceedings be by original, a copy of the *capias* upon the original, and not of the original itself, must be served. *Smith v. Anderton*, Prac. R. 342. *Peter v. Reignier*, ib. S. C. Bar. 410.

How, if by original.

If defendant be served within the *cinque ports*, it should be with a copy of process, properly directed to the constable of Dover Castle; otherwise bad. *Bax v. Culmor*, Bar. 422.

How, if in cinque ports.

If defendant be served in a *county palatine*, it must be with a copy of the process out of the original court, and not with a copy of the mandate. *Byers v. Whitaker*, Prac. R. 344. S. C. Bar. 406. Though before held contrary in *Beach and Smith*, Prac. R. 343. In all these kind of cases, the general rule is, that a copy of the process, out of the *superior* court, must be served.

How in county palatine.

(A 2.) *The Person by whom it is served.*

(A 2.)

It is not necessary that the process be served by a sheriff's officer; if by the attorney, or his clerk, it is sufficient. *Delafield v. Jones*, Prac. R. 345.

By whom process is to be served.

But by the 5 G. 2. c. 27. s. 3. in particular franchises and jurisdictions, the proper officer there must execute the process. County palatines, however, have been held not within this act, which has been construed to extend only to particular *liberties* in counties. *Griffin & Alcock*, 2 Barn. 399.

If in particular franchises; what deemed such.

In

Of the Service of Process.

The consequence of being served improperly in a liberty.

In these particular liberties, the process should be served by the bailiff, or officer belonging thereto; but if it be served by an improper person, court will not set aside the proceedings, though the party will be liable to an action. *Hall v. Wilby*, Bar. 404. S. C. Prac. R. 345.

Person serving process should be able to read.

But, in all cases, the person who serves the process should be able to read, so as to swear, if necessary, that he served a true copy; for where service was made by a bailiff who could neither write nor read, it was held bad. *Delafield v. Jones*, Caf. Prac. in C. B. 34.

(A 3.)

(A 3.) *The Manner in which it is to be served.*

Process is to be served personally.

The defendant, by the statute, is to be *personally* served.

Need not shew the writ,

There is no occasion to shew the writ itself at the time of service; for the act only requires defendant to be *served* with a copy, which is the same as if it had been said, *deliver a copy*. *Worley v. Glover*, Str. 877. B. R. *Panchand v. Woolley*, Bar. 302. S. C. Prac. R. 353. *Boswell v. Roberts*, Bar. 422. But if defendant should demand a sight of the writ, it seems necessary to shew it. *Edgar & Farmer*, Caf. temp. Hard. 138. Nor is there any necessity to read it over; but if defendant refuse to take it, upon its being tendered, and it is left at his house, it will be sufficient. *Wood v. Dodgson*, Bar. 278. Or if sent inclosed in a letter, and defendant opens the letter and takes out the copy. *Boswell v. Roberts*, Bar. 422. Or if it be put through the crevice of a door to defendant, who had locked himself in, the nature thereof being at the same time explained to him. *Smith v. Wintle*, Bar. 405. S. C. Prac. R. 354.

Unless requested;

Nor read it over.

If left at his house, or sent in a letter, or put through the door, it is good.

(A 4.)

(A 4.) *The Time when it is to be served.*

The time when it is to be served.

Service of a latitat at eight o'clock in the evening of the day when it was returnable, held good; and this, although the declaration be left in the office in the course of the same day. *Robertson v. Douglas*, 1 D. & E. 191. *Mathews v. Partridge*, Prac. R. 352.

In

Of the Service of Process.

In one case it was held good service at eleven, on the night of the return day. *Wepburn & Neale*, cited in Bur. 813.

And it is now settled (notwithstanding the practice was otherwise formerly, as appears from Bar. 415. 424.), that service of process upon the return day thereof, is regular in both courts. In B. R. *Maul v. Barnard*, Bur. 813. In C. B. 2 Wil. 372.; and this, although it be notoriously after the rising of the court. *Ib.*

It may be upon return day,

though the court is up,

Service of process on a day *previous* to the date of the process is bad. *Humphreys v. Mitchell*, Bar. 408.

But not before the date thereof;

So if it be after the date of the return. *Wheale v. Fuller*, 1 C. B. T. R. 222. For if defendant cannot be served before the return of process, plaintiff should sue out fresh process. *Smith v. Muller*, 3 D. & E. 627.

Nor after the return;

Process must not be served when defendant is attending the court upon any cause in which he is concerned; as it will be deemed a contempt of the court in the attorney who serves it. *Cole v. Hawkins*, Str. 1094.

Nor when defendant is attending the court.

(A 5.) *In case the Process be against several Defendants, or against Husband and Wife.*

(A 5.)

If the process be against several defendants, you must name them all in the notice, and in the copy of the process. *Cutliff v. Standish*, Prac. R. 354. And every one must be *served*; for if any one of them cannot be served before the return, fresh process must be sued out (*Smith v. Muller*, 3 D. & E. 627.), unless plaintiff proceeded by *special* original; and then he may go on to outlaw such as could not be met with. *Worley v. Bull*, Prac. R. 351. But until all the defendants be either served or outlawed, plaintiff cannot proceed.

How, if process be against several defendants.

All must be named and served.

If process be against husband and wife, service on the husband is sufficient for both; and if he does not appear for himself and wife, plaintiff may, on affidavit, enter an appearance for both. *Collins v. Shapland & Wife*, Bar. 412. *Buncomb v. Love & Ux.* *Ib.* 406. S. C. Prac. R. 351.

How, if against husband and wife.

H

(A 6.)

Of filing common Bail,

(A 6.)

(A 6.) *Of Punishment of Defendant if he treats Process with Contempt.*

Defendant must
not treat process
with contempt.

If at the time of service defendant speaks contemptuous words of the *court*, or of the *process*, an attachment will, on motion, be awarded against him: in the first case even without a rule to shew cause, but not so in the last. *Rex v. Kendrick*, Say. 114. *Semb. cont. Rex v. Jones*, Str. 185. Yet quere, whether, in the first case, without shewing cause, if upon the affidavit of one person only. *North v. Wiggins*, Str. 1068.

SECTION III.

Of Defendant's Appearance according to Process.

Formerly in
person.

Now by attor-
ney.

What it is.

When the defendant has been regularly served with a copy of the process, it is his duty to appear in obedience thereto. This appearance was formerly in person [vid. *Appendix*, H.], and entry was accordingly made, that the defendant *obtulit se in propria persona*; but it is now the practice to appear by attorney (vid. *ant. Introd. Observ. D.*); and the appearance is nothing more than a mere memorandum, signed by defendant's attorney, and filed with the proper officer, signifying that defendant has appeared in court by his attorney at the suit of plaintiff, and is ready to defend the action. When both parties are thus in court, the court is then said to have possession of the cause.

In treating of this head, we will briefly consider,

A. How Defendant is to appear in the respective Courts.

B. Who may appear by Attorney.

C. When Attornies are compelled to appear for Defendant.

D. Of the Time of Appearance.

E. Of Appearance in Actions against Husband and Wife.

J. Whe-

and entering an Appearance.

§. Whether Defendant is liable to a Penalty for not appearing.

Q. How Defendant is to appear in the respective Courts.

A.

The appearance of defendant is effected in the King's Bench, by what is called filing common bail; and in the C. B. by entering an appearance; for the reason of this distinction, see [*Appendix, H.*]; the mode of doing which is as follows:

First get a memorandum, or minute of warrant, to defend, on a 2s. 6d. stamp, agreeable to statute 25 G. 3. c. 80. and in the form therein prescribed; for which see ante, p. 23.; then proceed in the manner following, if

How to file common bail and enter an appearance.

In B. R.

In C. B.

By filing common bail.

By entering Appearance.

Get a common bail piece, which may be bought at any law stationers, and is a piece of parchment in the following shape, stamped with a treble sixpenny stamp; fill it up with the name of the parties, &c. as thus:

A common appearance is written on a piece of unstamped paper in the following form:

Middlesex. Appearance for James Davis, late of, &c. hosier, (as named in the writ,) at the suit of Joseph Sims, to a capias returnable on the morrow of All Souls.

T. S. attorney.

Carry this to the filazer of the county, in which process was sued out, who enters it in a book kept for that purpose.

At the filazer's pay 2 s. 6 d. (viz. 1 s. 6 d. for duty, and 1 s. for entry,) if one defendant. If several sued jointly, pay 2 s. 6 d. for first defendant, and 4 d. for each of the others. If sued separately, 2 s. 6 d. each defendant.

The warrant or memorandum above-mentioned is to be filed with it.

Hilary Term, in the 32d year of king Geo. 3d.

Middlesex, to wit:—James Davis having been served with process, is delivered to bail.

To John Doe, of Westminster, yeoman, and Richard Roe, of same place, gentleman.

At the suit of Joseph Sims.

Thomas Smith, attorney for defendant.

If filed according to statute, insert these words, filed according to statute.

Carry

It a

Where

Of filing common Bail,

Carry this with the memorandum to the clerk of the common bails, in King's Bench Office, to be filed; for filing pay, if in term, or within six days after it, 1 s. 2 d. If after that time, 4 d. more for a post terminum.

Where the proceedings are by bill (as against attorneys, &c.) appearance is then entered with the prothonotary.

There is no further post term incurred till the vacation of subsequent term after writ is returnable. The warrant or memorandum above-mentioned must be filed with it.

For every judgment by default, or non sum informatus or cognovit, bail should be filed for the defendant to warrant such judgment. Hil. 1 W. & M. Trin. 4 W. & M.

And also a memorandum of warrant, vid. ant. p. 22.

By a late rule, East. 30 G. 3. the clerk of the bails of this court, must mark the bail pieces numerically as they are received.

Common bail must be always filed, and appearance entered as of the term the writ is returnable; otherwise the cause will be out of court, and proceedings set aside. *Edgar v. Farmer*, Cas. Temp. Hard. 138.

25.

25. Who may appear by Attorney.

All persons,
except infants,
&c.

All persons may now appear by attorney, except those who are presumed to want sufficient legal discretion to appoint one; such as *infants*, *ideots*, and *feme covert*s; the first of whom must appear by guardian, and the two last in person; and if they should appear by attorney, it would be error upon the record. *Milner v. Milnes*, 3 D. & E. 629.; where other cases are cited.

C. When

and entering an Appearance.

C. When Attornies are compelled to appear for Defendant.

C.

If an attorney undertake to appear for defendant, the court will compel him to do so at all events, even though he were imposed upon when he made the undertaking. *Lorymer v. Hollister*, Str. 693. Should he refuse, an attachment will be awarded. Hil. 22 Car. 1. B. R. And he must appear in a proper manner, agreeable to the situation of the defendant; thus, If he be an infant, the appearance must be by guardian, and the like. *Stratton v. Burgis*, Str. 114.

Must at all events, if he undertake so to do.

But this undertaking must be an exprefs undertaking to appear (*Power v. Jones*, Str. 445.); and it is said that it must be in writing, and even signed by the attorney. *Loft*, 192. But Q. Whether the court, on motion, would not compel an appearance on a parol undertaking?

This undertaking must be in writing.

But Q.

If defendant's attorney receives a declaration against his client from plaintiff's attorney, this acceptance obliges the attorney to appear, unless it was accepted conditionally, in case his client should approve of it; for then, if he soon afterwards return the declaration, he will not be compelled to plead thereto. 1 Lil. Reg. 102.

Must appear, if he accepts declaration, unless accepted conditionally.

If there be several defendants in one declaration, an attorney is not to appear for more than those by whom he is retained. Pas. 24 Car. B. R. 1 Lil. Reg. 102.

To appear for no more than retain him.

If a defendant properly authorises an attorney to appear for him, though he should afterwards revoke it, yet the court will compel the attorney to appear; for the party shall not have it in his power to cause any delay by such countermand. Trin. 22 Car. 1. B. R. Mich. 1654. C. B.

Defendant cannot revoke any retainer;

Nor can any one change his attorney in any cause pending, without leave of the court. *Porvel v. Little*, Black. 8. *Macpherson v. Rorison*, Doug. 217.

Nor change his attorney without leave.

If an attorney take upon himself to appear, the court looks no further, but proceeds, as if he had sufficient authority

When attorney appears, court looks no further.

Of filing common Bail,

thority so to do, and leaves the party to his action against him, should it be otherwise. Ann, Salk. 87.

D.**D. Of the Time of appearing.**

Within eight days from return.

By the statute, 5 G. 2. c. 27. common bail must be filed, or an appearance entered, on the return of the process, or within eight days after.

Reckoned exclusive of return day ;

These eight days are to be reckoned in both courts, from the actual return day mentioned in the process, and not the *quarto die post* ; and they are *exclusive* of the day of the return ; *i. e.* if the process be returnable on the 6th, common bail should be filed, or appearance entered, on or before the 14th (*Bosanquet v. Rundo*, Bar. 245. S. C. Prac. R. 33.), unless the 14th fall on a Sunday ; in which case defendant has all the next day to appear in. *Shadwell v. Angel*, Bur. 56.

Nor counting Sunday, if the last ;

But may be filed afterwards, if not done by plaintiff's attorney ;

If defendant's attorney hath neglected to file common bail in time, let him search and see if it has been filed by plaintiff's attorney ; for, if not, he may still file it for defendant, though after the time directed by statute, provided it be within the next term after writ is returnable, and filed as of the *same* term writ is returnable. *Smith v. Painter*, 2 D. & E. 720.

Defendant may appear before the return.

Defendant may appear even before the return of the writ ; for the appearance is to the suit, not to the process. *Wynne v. Wynne*, 1 Wil. 39. Or if the writ be returned, not served. *Moor v. Watts*, Ray. 616. Or even before any writ be sued out ; but to make such last appearance effectual, plaintiff must sue out process within fourteen days afterwards. Trin. 4 W. & M. B. R.

Or before writ sued out.

E.**E. Of Appearance in Actions against Husband and Wife.**

If a man and his wife be sued, the husband must appear for both ; and if he fail so to do, plaintiff may enter an appearance for them.

The

and entering an Appearance.

The case of *Clark v. Norris & Wife*, as reported in 1 C. B. T. R. 235. is indeed otherwise, and *seems* to have decided, that where the defendant is joined with his wife in the writ, he may enter an appearance for himself only; but I rather imagine that there were circumstances in this case (not reported) warranting this decision: *Norris*, the defendant, as I understand, was in fact a *single* man; but plaintiff conceiving him to be married to the woman who had contracted the debt, sued him as a *married* man jointly with his *supposed* wife; upon which he only entered an appearance for himself, which was clearly proper; plaintiff, therefore, having signed judgment for want of his appearing for the wife also, and defendant's reason for not so doing being explained to the court, the judgment was held irregular; so that this determination by no means affects the general point of practice, that the *husband*, when jointly sued with his wife, ought to appear for both.

Husband must appear for both.

But if a wife appear without her husband, such appearance is not void in law (*Traverse v. Buckley & Un.* 1 Wil. 264.); though plaintiff cannot proceed without bringing the husband into court.

If wife appear without him, it is not void; but plaintiff cannot proceed.

§. Whether liable to any Penalty for not appearing.

By the 9 & 10 W. 3. c. 25. s. 33. if defendant did not file common bail, and enter an appearance in eight days, he was liable *immediately* to a penalty of 5*l*. This was by way of compulsion upon defendant to appear, and it was a rule absolute in the first instance. See 5 Mod. 392. Glb. B. R. 369. *White v. Holland*, Str. 737. but afterwards by 12 G. 1. c. 29. the time was altered to *four* days, and plaintiff was authorised to appear for defendant in case of his default; and by the 5 G. 2. c. 27. the time was again enlarged to eight days; it is doubted, therefore, in *Bac. Abridg.* 214. whether the clause in 9 & 10 Wil. is not virtually repealed by the latter statutes; now, if it were not repealed by 12 G. 1. c. 29. it does not seem to have been so by 5 G. 2. c. 27. which is merely explanatory of the former; but it does not appear to have been repealed by 12 G. 1. because the

Of Plaintiff's appearing according to Statute.

- case of *White & Holland*, Str. 737. was decided since that period; it rather seems, therefore, as if the legislature intended the latter statutes as an additional remedy to plaintiff, and that still the penalty might be enforced. But Q.

SECTION IV.

Of Plaintiff's appearing for Defendant according to Statute.

By what statutes
such appearance
authorized.

It has been just observed, that before the statute 12 G. 1. c. 29. the only compulsion upon defendant to appear according to the process, was the penalty of 5 l. in case of his default, inflicted by statute 9 & 10 W. 3. 3 for no one could enter such appearance but himself or his attorney. But by the 12 G. 1. c. 29. and the 5 G. 2. c. 29. it is enacted, that in case defendant shall not appear within eight days after the return of such writ or process, the plaintiff, upon making and filing an affidavit of the *personal* service of such writ or process, may file common bail, or enter an appearance for such defendant, and proceed thereon, as if such defendant had duly appeared himself.

We will, therefore, consider,

A. How Plaintiff is to appear for Defendant according to Statute.

B. When Plaintiff is to appear.

2. A. How Plaintiff is to appear for Defendant according to Statute.

At the expiration of the eight days, let plaintiff's attorney search in the proper office to see if defendant has appeared himself: if not, a proper affidavit must then be made by the person who served the process; which, by the 5 G. 2. c. 27. may be sworn before any judge or commissioner of the court out of which the process issued, authorised to take affidavit in such courts; or before the proper officer for entering the common appearance in such court, or his

Of Plaintiff's appearing according to Statute.

his deputy; but in town it is generally sworn before the clerk of common bails, if in B. R.; or the filazer, if in C. B.; or their respective deputies*.

The affidavit having been made and sworn, plaintiff's attorney may then file common bail, or enter an appearance.

In which case the same form of common bail-piece, or appearance, will do, as mentioned in the last section, only add therein the words (filed according to the statute).

The affidavit is to be filed gratis, and is to the following effect:

A. B. of, &c. clerk to T. S. attorney for the above-named plaintiff, maketh oath, and saith, that he did, on the day of instant, personally serve the above defendant with a true copy of (a writ of *capias ad respondendum*, if in C. B.; or bill of *Middlesex* or *latitat*, if in B. R. †) which appeared to this deponent to be regularly issued out of this honourable court, and returnable on under which said copy was written an English notice to the said defendant of the intent of such service, pursuant to the statute in such case.

Sworn, &c.

A. B.

No memorandum, or warrant, is required in this case. *Vid. ante* Introd. Observ. D. 3.

When the suit is by original in B. R. an appearance is entered with the filazer in the same manner as an appearance in C. B.; and the affidavit of service, when by original, is like the above, only specifying the writ, and where returnable.

B. When Plaintiff is to appear.

B.

Plaintiff cannot appear for defendant before the 9th day, exclusive after the return of the process; i. e. if process be returnable on the 6th, not till the 15th. *Morse v. Farnham*, Prac. R. 32. Nor after a declaration de-

Not till the ninth day after return;

* It ought not to be sworn before any attorney in the cause.

† The kind of writ must be described, the affidavit of service of a writ of *mesne* process only held bad, *Lakin v. Dewall*. East. Term, 25 G. 3. and judgment set aside, and defendant discharged, though in execution, on this objection only.—See also *Cutcliffe v. Standish*, Bar. 405.

livered,

Of Defects and Irregularities in Process.

Nor after declaration, unless delivered *de bene esse*;

livered, if it be delivered in *chief*. *Wrath v. Bristow*, Prac. R. 31. *Smith v. Painter*, 2 D. & E. 719. But plaintiff may deliver a declaration against defendant *de bene esse*, or conditionally before the time for his appearing has elapsed, and afterwards file common bail in case he does not appear in time.

Nor after the next term from return.

Plaintiff must file common bail according to the statute, either in the term when the writ is returnable, or in the term following; and he cannot do it afterwards. *Smith v. Painter*, 2 D. & E. 720. And in the latter case he should entitle the bail-piece *as of* the term writ was returnable.

SECTION V.

Of Defects and Irregularities in Process.

- A. How far the Courts will amend Process.
- B. How Defects or Irregularities cured.
- C. How taken Advantage of.
- D. At what Time to be complained of.

A.

A. How far the Courts will amend Process.

Courts cannot amend originals;

The courts of King's Bench and Common Pleas cannot amend an *original* writ, because it issues out of the court of Chancery: besides, there is nothing to amend by; and if it be once executed, though improperly, it cannot afterwards be used, but must be superseded. *Ogier v. Hayward*, Bar. 417. *Carty v. Aspley*, 3 Wil. 454. But *mesne* process, and also an attachment of privilege, which is in the nature of an original, the law courts may amend. *Ib.*

But may *mesne* process.

Any thing will do to amend by—

A little matter will be deemed sufficient to amend by: thus, a bill of Middlesex indorsed and filed of record as of the 24 G. 3. was ordered to be taken off the record, and amended according to the truth of the fact, and recorded again as of Hil. Term, 25 G. 3.; and the court held, that the *præcipe* to the officer was sufficient to amend by. *Green v. Rennet*, 1 D. & E. 782. And in the

As the *præcipe*,

Of Defects and Irregularities in Process.

the C. B. the court said, that when a plaintiff bespeaks a writ, returnable such a day, he *impliedly* orders the officer to make the teste regular; and by those *implied* instructions we may amend. *Carty v. Asbley*, Black. 918. See ante, sec. 1. (E 6.).

Or even implied instructions.

No error can be assigned on *mesne* process. Ib.

No error on *mesne* process.

If therefore the process be in any respect defective as it cannot appear upon the face of the record by *oyer*, nor assigned for error, the only advantage to be taken thereof is, by motion to set aside the proceedings.

The court will also amend the appearance. In the case of *Whelton v. Packman*, 3 Wil. 49. defendant was rightly named *John* in the *capias* and in the declaration; plaintiff's attorney made an affidavit of the service of the writ on the defendant by his right name, and then entered an appearance for him according to the statute by the name of *James* instead of *John*; it was moved to set aside declaration, defendant not being in court; but it was held by the court a mere slip, and they ordered the filazer to rectify the mistake.

Appearance may be amended.

B. How Defects or Irregularities cured.

B.

(B 1.) *Whether by Defendant's Appearance.*

(B 2.) *Whether by Plaintiff's Appearance according to Statute.*

(B 3.) *Whether by accepting Declaration.*

(B 1.) *Whether by Defendant's Appearance.*

(B 1.)

Any error in *mesne* process is cured by the party's appearance, and he shall not afterwards take advantage of it; because the only intent of *mesne* process is to bring the defendant into court, and when he is come in, there is an end of the process; for defendant might have come in upon the writ without it. *Rex v. Hare*, Str. 155. *Wilson v. Finch*, Bar. 163. *Wade v. Wadman*, ib. 167.

Defects in process cured by appearance.

If defendant be served with process by a wrong name, or addition, and appears by his right name, and plaintiff declares against him by his right name, the defect is cured, and the court will not set aside the proceedings for irregularity. *Hole v. Finch*, 2 Wil. 393. *Doo v. Butcher*, 3 D. & E. 611.

Though defendant was named wrong therein.

(B 2.)

Of Defects and Irregularities in Process.(B 2.) (B 2.) *Whether by Plaintiff's Appearance according to Statute.*

But not cured
by plaintiff's
appearing ac-
cording to sta-
tute.

But although the appearance by defendant shall be deemed a waiver of such defects or irregularities; yet the plaintiff shall not be able to correct his own errors by appearing for defendant according to the statute. *Westall v. Finch*, Bar. 406. *Sed CONTRA, White v. Washington*, Prac. R. 348.

So that if process be sued against defendant by a wrong name, and plaintiff files common bail according to statute in defendant's right name, and then declares against him in his right name, this shall not be of avail; but proceedings will be set aside. *Doe v. Butcher*, 3 D. & E. 611.

(B 3.) (B 3.) *Whether by accepting Declaration.*

Accepting decla-
ration will cure
defects.

Whatever previous defect or irregularity there may have been in the *mesne* process, or the service thereof, such as want of notice to the copy of process, or a proper number of days between the teste and return, or a regular personal service of the process, or even if no common bail has been filed for defendant; yet if defendant, or the attorney generally concerned for him, accepts the declaration, or takes it out of the office, and pays for it, it is a complete waiver of any such defects or irregularities. *Morgan v. Luckup*, Cal. Temp. Hard. 242.

Though bail
was filed ac-
cording to sta-
tute.

* So although plaintiff filed common bail for defendant according to statute; yet any defect in the process shall be cured by defendant's taking declaration out of office. *Caswall v. Martin*, Str. 1072. *Marquand v. Mayor of Boston*, Bar. 416.

C. C. How Defects or Irregularities to be taken Advantage of.

By motion;

But process must
first be returned.

The proper way of taking advantage of any defects in process or irregularities in the service thereof, or the like, is by motion in court to stay proceedings. — But if the error be in the process, it must be first returned, and brought before the court, before any advantage can be taken thereof. 3 Wil. 58. *Perrott one, &c. v. Hele*.

3D. At

Of Defects and Irregularities in Process.

D. At what Time Defects and Irregularities in Process to be complained of.

D.

This depends upon the nature of the defect, whether it be such as vitiates the proceedings *in toto*, so as to render them null and void; or only an irregularity, which may be cured or waived by some subsequent act of the parties.

This depends upon the nature of the defect.

Thus, if plaintiff's name be omitted in a writ, defendant may *at any time* apply to set aside proceedings, for it is as no process (*Thompson v. Brew*, Andr. 16.); so where the affidavit of personal service was defective, proceedings were set aside, though defendant was in execution. Vid. ante, p. 105. in notes.

If process void, at any time.

If the irregularity be in the notice subscribed to the copy of the process, the motion must be made before judgment signed; if in the notice of declaration, two days before the time appointed for the execution of the writ of inquiry. *Grimes v. Cleaver*, Bar. 256.

If only irregular, before judgment.

And in general it seems, that all irregularities in the process, *i. e.* previous to the declaration, should be complained of before judgment signed. *Grimes v. Cleaver*, Bar. 256. *Morse v. Farnham*, Bar. 243. *Jemmett v. Voyer*, Bar. 296. Though it need not be till after notice of declaration given to defendant. S. C. Prac. R. 355.

But if defendant applies so soon as he has an opportunity, though after judgment, court will set aside the proceedings, *Smith v. Painter*. 2 D. & E. 720.

If plaintiff enters an appearance for defendant before the expiration of the 8th day, and defendant has not himself appeared, but suffers plaintiff to proceed, he must complain of plaintiff's irregularity before judgment is signed, or it will be too late. *Morse v. Farnham*. Prac. R. 32.

If defendant complains of any irregularity in the process or notice, he must annex the copy to his affidavit, that it may appear to the court.

✶ Having fully treated of the process, i. e. the means of compelling an appearance, in actions not bailable, and shown in what way this appearance may be effected, either by defendant appearing himself, or by plaintiff appearing for him according to the statute; the next thing to be considered is the PROCESS in bailable actions, after which (the parties being once in court) the proceedings in both kinds of actions are nearly similar.

CHAP. IV.

Of the Mode of proceeding in *bailable* Actions from the Commencement of the Suit to the Declaration.

SEC. 1. *Of the Affidavit to hold to bail.*

SEC. 2. *Of the Process or Writs in bailable Actions, and how to sue them out.*

SEC. 3. *Of the Warrant and Arrest.*

SEC. 4. *Of Bail to the Sheriff, or Bail below.*

SEC. 5. *Of Bail to the Action, or Bail above.*

SEC. 6. *Of the Surrender in Discharge of Bail.*

SEC. 7. *Of the Assignment of the Bail Bond, and the Proceedings thereon.*

SEC. 8. *Of Proceeding against the Sheriff, called Ruling the Sheriff.*

SECTION I.

Of the Affidavit to hold to Bail.

Affidavit.

IF the action be such as to require special bail, and it is the intention of the plaintiff to arrest defendant, the first thing necessary to be done is to make an *affidavit* of the true cause of action.

So tenacious is our law of the liberty of the subject, that nothing less than the party's positive oath is sufficient to subject any one to an arrest.

This

Of the Affidavit, &c.

This affidavit is particularly directed to be made by the 12 G. 1. c. 29. s. 2. which enacts, That in all cases where the plaintiff's cause of action shall amount to the sum of 10l. or upwards, affidavit shall be made, and filed of such cause of action; which affidavit may be made before any judge or commissioner of the court out of which such process shall issue, authorized to take affidavits in such courts, or else before the officer who shall issue such process, or his deputy, which oath such officer or his deputy are thereby empowered to administer; and for such affidavit, one shilling, over and above the stamp duties, shall be paid, and no more.

Directed by Stat.
12 G. 1.

In further explanation of the above statute, we will consider

(A) The Degree of Certainty requisite in such Affidavit.

(B) By whom to be made.

(C) Before whom to be made.

(D) How, and when to be filed.

(E) How to be stamped, and of joining several Defendants, or Causes of Action, in one Affidavit.

(F) Of Counter and Supplemental Affidavits.

The statute only generally says, that an affidavit shall be made; but, in order to prevent oppression and evasion, various restrictions and regulations have been made by the courts respecting it; and particularly as to

(A) The Degree of Certainty requisite in such Affidavit with respect to

(A 1.) The actual Existence of the Debt.

(A 2.) The Description of the Cause of Action.

(A 3.) The Language in which it is drawn.

(A 4.) Exceptions as to Executors, Assignees, &c.

It

Of the Affidavit

**Affidavit must
be positive.**

It is an invariable and regular rule, that the affidavit must be as *positive* as the nature of the case will admit, *Pomp v. Ludvigson*. Bur. 655. Where a variety of cases to the same point are cited. Also *Sheldon v. Baker*. 1 D. & E. 83.

It must therefore expressly state, that the defendant is indebted to plaintiff without any thing being left to be collected by *inference*.

**Not by way of
reference.**

For whenever an affidavit is only by way of *reference*, it is bad—as that defendant is indebted to A. B., in so much as appears by the books and ledger of A. B. *Barclay v. Hunt*, Bur. 1995.; or as appears by a stated account attested by the Consul at Oporto, *Svarbreck v. Wheeler*, Bar. 100.; or, as appears by an affidavit made by the plaintiff in Amsterdam, which the deponent believed to be true, *Rios v. Belifante*, Str. 1209.; or upon a bond, as *thereby* may appear, *Heathcote v. Goslin*, Str. 1157.; or, as appears by the master's allocatur, *Powell v. Portherch*, 2 D. & E. 55.; or, as acceptor of a bill of exchange, as appears by the said bill, &c. *Rolin v. Mills*, 1 Wil. 279; or, as appears by agreement dated such a day, *Jennings v. Martin*, Bur. 1447.; or, as appears by an account stated under defendant's own hand, *Anon.* 1 Wil. 121.; or, as appears by the confession of defendant, and by his promise to pay the same. *Kelly v. Devereux*, Say. 59.

**Nor any words
of such tendency.**

So if the words be not strictly words of reference, yet if they be of the same tendency, leaving any thing to be collected therefrom, the affidavit will be bad; as, that defendant is indebted to plaintiff in 20l. and upwards, *according to the bill of this deponent delivered to defendant*. *Williams v. Jackson*. 3 D. & E. 575.

Because in all the above cases the debt is not positively sworn to, since although it may *appear* to be due by the books, or the bond, or the like, yet in fact it may have been paid and satisfied, and a separate receipt or discharge taken.

**In one case held
otherwise, but
Q**

In one case, indeed, the affidavit was held sufficient, although the words were, that defendant was indebted to plaintiff

to hold to Bail.

plaintiff in, &c. *as he computes it.* *Moulty v. Richardson*, Bur. 1032. But Q. Whether this would now be deemed sufficiently positive, and in the case of *Mackenzie and Mackenzie*, 1 D. & E. 717, Buller, Jus. doubted whether it had not been over-ruled.

Again: Swearing to belief is not, generally speaking, sufficient. Swearing to belief bad.

As where the affidavit made by the plaintiff's book-keeper was, that the defendant was indebted to plaintiff in so much, as the deponent verily believed. *Claphamson v. Bowman*, Str. 1226.

Nor is swearing to belief sufficient, though with a reference to accounts sent from abroad where the debt arose. *Pomp v. Ludvigson*, Bur. 655. *Van Morfell v. Julian*, 1 Wil. 231. Though with reference to accounts.

But if, from the nature of the case, the party can only have a ground of belief, and cannot make a direct assertion, it is otherwise.

As where a bond was given, conditioned for the payment of bills of exchange drawn in England on A. in the East Indies, in case such bills should be returned to England protested for non-payment, it is no objection to an affidavit to hold the obligor to bail, because, after stating that he was indebted to deponent in a certain sum; stating also the condition of the bond; it said, that the said bills were not paid to his *knowledge or belief* in India or elsewhere, but were still unpaid. *Hobson v. Campbell*, 1 C. B. T. R. 247. Except from the nature of the case, the party cannot swear positively.

The court of C. B. is not so strict with respect to the positiveness and certainty of the affidavit as the court of K. B. The former holding, that *circumstances* of the cause of action are sufficient without positively swearing to the debt. *Long v. Lynch*, 2 Blac. 740. Sc. 3 Wil. 154. Whereas the latter always requires a positive oath of a subsisting debt. Court of C B. not so strict as B. R.

For in B. R. the affidavit must further shew that it is a *subsisting* debt at the time of making the affidavit, and of suing out the writ. *Kelly v. Devereux*, 1 Wil. 339. In latter, affidavit must shew the debt to be subsisting.

Of the Affidavit

The affidavit should therefore state, that the debt is still due; and if it does, it will be good, even although words of reference may be inserted, because it would be then rendered sufficiently positive.

It was for want of this that the affidavit of a debt, as appears by the master's *allocatur* above-mentioned, was held insufficient. *Powell v. Porterch*, 2 D. & E. 55. S. P. *Mackenzie v. Mackenzie*, 1 D & E. 716. In which last case, Buller, Jus. mentioned an instance where affidavit was bad, although the words were, that defendant was indebted to plaintiff in 5000l. for money had and received, and for *which he has not accounted*.

at the time of
suing out writ.

It is upon this principle, that an old affidavit, made some time ago, is not sufficient, because the debt may have been since paid; and it must appear to be as before mentioned, not only a subsisting debt at the time of making the affidavit, but also of suing out the writ. *Collier v. Hague*, Str. 1270.

(A 2.)

(A 2.) *Of the Description of the Cause of Action.*

Affidavit must
describe with
certainty the
cause of action,

As the affidavit must be positive with respect to the actual existence of the debt, so it must be certain as to the description of the *cause of action*.

and shew how
the debt arose.

It must shew how the debt arose, and this, although the circumstances be long and complicated, and although the ground of the demand cannot be set forth, without stating the whole substance of the declaration. *Cope and another v. Cooke*. Do. 467.

An affidavit, therefore, that defendant was indebted to plaintiff in 500l. and upwards, *Cooke v. Dobree*, C. B. T. R. 10.; or, in so much *upon promises*; *Cope v. Cooke*, Do. 467.; or in 23l. and upwards in *trover*. *Hubbard v. Pacheco*. C. B. T. R. 218.; or that defendants (*Baron & Feme*), or one of them, was indebted for board, &c. provided for the wife. *Paris v. Stroud & Un.* Bar. 95.; and the like are not sufficiently certain and descriptive.

to hold to Bail.

So in actions on bonds, to save harmless, &c.; and in actions of covenant, the affidavit must state positively and certainly how, and for how much, plaintiff is damaged. *Whitfield v. Whitfield*, Bar. 109.

How if on bond of indemnity.

An affidavit to hold to bail on the lottery act, 27 G. 3. c. 1. should specify the nature of the offence, and aver that defendant had incurred the forfeiture; but the offence need not be described circumstantially; nor is the plaintiff obliged to swear that defendant is *indebted* to him to the amount of the penalty; for as no person is entitled to the penalty till the process is actually sued out, it cannot be said to be a *debt* due to the plaintiff at the time of making the affidavit. *Davis v. Mazzinghi*, 1 D. & E. 705.

If on the lottery act.

But an affidavit, that defendant is indebted to plaintiff in 103l. for goods which defendant converted to his own use; *Emerson v. Hawkins and others*, 1 Wil. 335.; or that the defendants have possessed themselves of divers goods belonging to plaintiff, and have refused to deliver them up, and that they, or some of them, have converted and disposed of them to their own use; *Charter v. Jaques and others*, Cow. 529. is sufficient to hold to bail in trover.

What a good affidavit in Trover.

(A 3.) *Of the Language in which Affidavit is drawn.*

(A 3)

The affidavit must be clear, certain, and correct in the language in which it is drawn. It should be such an oath as a perjury can be assigned upon.

Affidavit must be correct in the language.

The most trifling inaccuracy, or clerical mistake, therefore, will render it defective; as where an affidavit of debt was made, that defendant *in* indebted, instead of *is* indebted, the court held it defective, and as no affidavit, and discharged defendant on common bail; because a perjury could not be assigned upon it. *Reeks v. Grone-man*, 2 Wil. 225.

A clerical mistake will vitiate it;

So if the action be brought for a penalty in an act of parliament, if the act be misrecited in the affidavit, it will be bad; as calling it an act passed in the 27 G. 3.

Or if a statute be misrecited.

Of the Affidavit

when it passed in the 22 G. 3. But the party is not bound to set forth the year at all when the act passed. *Watson v. Shaw*, 2 D. & E. 654.

(A 4.)

Executors, administrators, and assignees are exceptions to the above doctrine.

(A 4.) *Exceptions as to Executors, Assignees, &c.*

It has been already shewn that, generally speaking, the affidavit must be positive, nor will swearing to belief be alone sufficient; but there are some exceptions to this rule:—Thus in all cases where *executors, administrators, or assignees* make the affidavit, they are permitted to swear as to their *belief* only, which, from the nature of their respective situations, is as much as they can do. 1 D. & E. 717. *Touna v. Edwards*. Burr. 2283.

They may swear to belief.

Thus where an assignee of a bond swore that the obligor was indebted in 90l. for principal and interest, as he *believed*, the court held it sufficient to hold to bail. *Loveland v. Bassett*, Trin. 16 Geo. 2.

But it is better for the obligee and assignee to join in the affidavit.

So if an executor swears to the books of the testator, and that he believes them to contain a true account, and that the debt is still unpaid; or if an assignee swears that the defendant is indebted, as appears to this deponent, by the last examination of the bankrupt, and as the deponent verily believes, and that he has not received the debt, or any part of it, and that he believes it to be still due, such affidavits are sufficient to hold to special bail. *Touna v. Edwards*, Bur. 2283.

But words of reference alone will not do.

But it is to be observed, that in all these cases, words of reference alone, such as *appears by the testator's or the bankrupt's books*, and the like, are not sufficient, unless followed up by the *belief* of the party who makes the affidavit. *Sheldon v. Baker*, 1 D. & E. 84. *Barclay and others*, assignees, v. *Hunt*, Bur. 1992. *Walrond v. Franksam*, Str. 1219. *Fludger*, assignee of *Jackson*, v. *Hughes*, 27 Geo. 2.

If there be three assignees of a bankrupt, one may make an affidavit, and hold to bail. *Swaine and others v. Cramond*, 4 D. & E. 176.

(15) By

to hold to Bail.

(15) By whom the Affidavit ought to be made.

25.

The affidavit may be made by plaintiff himself, or his wife, or servant, or any third person in his absence who knows of the debt being contracted, and can swear that it is still due.

Who may make the affidavit.

It is generally laid down, that it should be made by some person who is legally competent to be a witness. Tid. 39. So in *Nichols v. Dallybunt*, Bar. 79. where an affidavit, made by a pickpocket returned from transportation, was held insufficient, because no credit could be given to the affidavit. Yet in later cases, it has been held otherwise; and an affidavit made by a person convicted of perjury was deemed good; for it was said, that although plaintiff cannot be a witness, yet he must not be stripped of his legal remedy to recover his just debts. *Horsley v. Somers*, Bar. 116. *Davis v. Carter*, Sal. 461.

Q. Whether it must be made by a person competent to be a witness?

Where the affidavit is made by a third person, it must be positive as to its being a subsisting debt; for an affidavit that the defendant is indebted to the plaintiff in a certain sum of money, as appears by a bottomry bond in the deponent's custody, and that the defendant, on such a day, acknowledged the debt to him, and promised to pay the same to the deponent, who has authority from the plaintiff by letter of attorney to receive the same, is not sufficiently positive. *Kelly v. Devereux*, 1 Wil. 339.

Affidavit by a third person must be that debt is subsisting.

If the plaintiff, being in Scotland, wants to hold defendant to bail in England, he may go before a magistrate in Scotland, competent to administer an oath, and make affidavit in the presence of another person who is shortly coming to London; which person, upon his arrival in London, must also make affidavit that the former affidavit of the debt was made by the plaintiff; that the hand-writing subscribed thereto is his own hand-writing; that the said affidavit was made and taken before a magistrate, who, this deponent believes, had competent authority to administer an oath; and that the hand-writing subscrib-

If plaintiff living in Scotland, wants to hold defendant in England to bail, how he may do it.

Of the Affidavit

ing said affidavit, is the hand-writing of such magistrate, on which several affidavits a judge makes an order to hold to bail.

C.

(C) Before whom to be made.

By the act 12 G. 1. c. 29. affidavits to hold to bail are ordered to be made before any *judge or commissioner of the court*, out of which the process shall issue, authorised to take affidavits in such courts, or else before the *officer who shall issue such process, or his deputy*; which oath such officer or his deputy are thereby empowered to administer.

The commissioners authorised to take affidavits mentioned in the above act, are those appointed by the judges, &c. by virtue of the statute 29 Car. 2. c. 5. which enacts, that the judge, &c. of the courts of Westminster, by commission, may empower persons in the several counties of England to take affidavits concerning matters depending in their several courts.

By rule of K. B. Easter, 15 G. 2. affidavits to hold to bail may be sworn before any such commissioner, although he be concerned as attorney for the plaintiff. But in C. B. affidavits made before such commissioners are disallowed.

It is to be observed, however, that by a late rule of K. B. 31 G. 3. whenever an affidavit is taken by any commissioner of the court, made by any person who, from his or her signature, appears to be *illiterate*, the commissioner taking such affidavit shall certify, or state, in the jurat, *that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same; and also that the said party wrote his or her signature in the presence of the commissioner taking the said affidavit.*

D.

(D) How, and when to be filed.

The act of 12 G. 1. says, the affidavit shall be made and filed. It must be filed, therefore, with the proper officer

to hold to Bail.

officer before, or at the same time the writ is sued out; else the court will discharge the party from the arrest on filing common bail, although an affidavit should be produced, and proved to have been actually made and sworn before the writ was sued out. *Reeks v. Groneman*, 2 Wil. 225.

(C) How to be stamped, and of joining several Defendants, or Causes of Action, in one Affidavit.

The affidavit must be stamped with a treble six-penny stamp.

It is held contrary to the meaning of the statute, and a fraud upon the stamp duties, to put several defendants in one affidavit, if the cause of action be several; or several causes of action against one and the same defendant; unless the affidavit is stamped accordingly.

When several defendants were thus joined for several causes of action with only a common stamp affidavit, it was held bad. *Gilby v. Lockyer*, Do. 217.

So where an affidavit was made to hold the defendant to bail, which had but one stamp, and joined together, an action of debt on bond for 800l., and an assumpsit for 150l.; and on objection that debt and assumpsit could not be joined in the same affidavit, and moreover that it was a fraud on the stamp duty; the court discharged the defendant on common bail in both actions, for the impropriety of joining them in the same affidavit; but they did not lay much stress upon the objection of its being a fraud on the stamp duty. 5 Burr. 2690. *Crooke v. Davis*,

(F) Of Counter and Supplementary Affidavits.

In the King's Bench, when a plaintiff has once sworn positively to his debt in order to hold the defendant to special bail, the court will never receive any affidavit
I 4 what-

Not allowed in K. B.

Of the Affidavit

whatever either to explain or contradict the plaintiff's oath; even an affidavit of the plaintiff's confession that the defendant owes him nothing, will not be received. *Emerson v. Hawkins and others*, 1 Wil. 335. S. C. Say. 53. *Kelly v. Devereux*, 1 Wil. 339. *Heathcote v. Goslin*, Str. 1157.

So that in this court, an affidavit once made, cannot be amended, nor its defects cured by a *supplementary*, nor in any wise contradicted by a *counter affidavit*. *Cope and another v. Cooke*. Do. 467. *Reeks v. Groneman*, 2 Wil. 225. *Mackenzie v. Mackenzie*, 1 T. Rep. 717.

In one instance
otherwise.

In one instance, however, as I have been well informed, the court admitted a supplementary affidavit to be read. *Trinity*, 33 & 34 Geo. 2. *Innegan v. Jones*. On a rule to shew cause why common bail should not be accepted, the case was, plaintiff made affidavit that defendant was indebted to him in ——— (the sum not taken down) upon an account stated, and upon bond, and upon certain articles of agreement; court admitted a supplemental affidavit to be read explaining the former affidavit, by which plaintiff swore, that the whole sum marked on the back of the writ was due on account stated, and court discharged the rule; at the same time observing, that plaintiff ought not to make affidavit of what was due on one side of the account only, but should be governed by the balance due upon the whole account.

In the King's Bench, when plaintiff has obtained upon his affidavit a judge's order to hold defendant to bail, no counter affidavit shall be allowed to lessen the bail. But if plaintiff's affidavit is false, he must be indicted for perjury, as in the common case of affidavits for special bail. *Smith v. Frazer*, 1 Blac. Rep. 192.

So in debt on bond, though the defendant says it was usurious, or *per duress*, it shall not excuse from special bail, for the merits of the cause shall not be determined on motion. Anon, Salk. 99, 100.

But

to hold to Bail.

But the practice of the *Common Pleas* differs in this respect, and admits of *supplemental* and even *contradictory* affidavits; for they hold, that notwithstanding the plaintiff makes a positive affidavit of his debt, yet the matter of bail is examinable by the court. *Russell v. Gately*, Bar. 76. Sem. cont. *Hadderweek v. Catmur*, Bar. 61.

But in C. B.
supplemental
and cross affida-
vits are allowed.

An action of debt on bond wherein defendant was held to bail on plaintiff's affidavit, defendant moved for a common appearance, and that plaintiff might produce the bond to the court, upon an affidavit that defendant had great reason to believe that the whole sum due was paid by one of the co-obligors, which would appear by indorsements made on the said bond when produced; plaintiff, in answer, made affidavit, that 100l. and upwards remained due to him on the bond after all just allowances; that he had seen the bond, which was uncanceled and in full force some months before, but had mislaid it; and being severely afflicted with the gout, could not search among his papers himself, so that it could not be produced. It was urged for plaintiff, that no declaration being yet delivered, defendant is not entitled to oyer of the bond. But after a declaration, with a profert in Cur. he may demand oyer. The court held, That as the matter of bail is discretionary, and as the measure of the sum for which bail ought to be given is with certainty to be had only from the bond itself, the bond ought to be produced; and for want of producing it, a common appearance was ordered. *Shaw Bart. v. Hawkins*, Bar. 72.

An affidavit made by a third person, that the defendant was indebted, as appears by a stated account, was held insufficient, but made good by another affidavit that the defendant owned the account. *Swarbreck v. Wheeler*, Bar. 100.

So where an executor at first only swore to the debt, as appeared by the accounts of the deceased; a subsequent affidavit, that he *believed* the debt to be due, was admitted to hold to bail. *Roche, executor, v. Carey*, 2 Blac. 850.

So

Of the Affidavit, &c.

So in the case of *Manning v. Williams*, plaintiff made two affidavits; the last was held, *prima facie*, sufficient; but cross affidavits being read controverting the fact, common appearance was ordered. Bar. 87.

Provided the first affidavit be a good and valid one.

But in C. B. supplementary affidavits are only allowed where the original affidavit is in itself a good one, such as a perjury can be assigned upon, though perhaps not sufficiently strong to hold defendant to bail; for where the original affidavit itself is null and void through any fatal inaccuracy, or clerical mistake, no supplementary affidavit can be had, nor can the defects be cured.

So that where the affidavit was as follows: A. B. of, &c. make oath, that C. D. of, &c. is justly indebted, instead of *is*; upon a supplementary affidavit being offered it was refused by the court, who said, that the first was no affidavit, because no perjury could be assigned upon it; that the arrest, therefore, was contrary to law, and that the court could not make *that* lawful which the law says is unlawful; and that supplemental affidavits were only allowed by the court to supply small defects in affidavits not quite full enough, but never allowed, where the first amounted to no oath at all. *Reeks v. Groneman*, 2 Wil. 224.

So in an affidavit that defendant was indebted to plaintiff in the sum of 560l. and upwards, which was held bad for uncertainty, court refused a supplementary affidavit. *Cooke v. Dobree*, 1 C. B. T. R. 10.

As the Second Chapter of this work, which shows in what cases common or special bail is required, is nearly connected with this stage of the proceedings, inasmuch as it is necessary to know before the process be sued out, whether the cause of action be bailable or not, I shall take this opportunity of observing, that since that chapter was committed to the press, a case has been decided which materially affects the doctrine there laid down, and alters the practice of the court of King's Bench in holding to bail in actions on judgments recovered. In page 46 ante, it is said that there is a difference of practice between the two courts in an action on a judgment where the original cause of action was under 10l.; but by the addition of costs, the judgment

By a late case the practice, as laid down in page 46 and 47 ante, is altered.

Of the Process, &c.

ment was above that sum, in which case the court of King's Bench does not allow special bail, but the court of Common Pleas does. But by the case of Lewis and Pottle, decided last Hilary Term, 4 D. & E. 570. this difference is settled; for Lord Kenyon then said, that as a different practice in this respect had prevailed in the different courts, it was proper that a conference should be had with the judges of the Common Pleas, in order to make the practice in future uniform. And accordingly, that the judges of that court had consulted with those of the Common Pleas, and that the result of it was, that they had agreed to conform to the practice of the Common Pleas; so that now, in both courts, such defendant may be held to bail. And I should conceive, that henceforth, a like uniformity of practice would also prevail in the third and fourth cases mentioned in page 47 of chap. 2, wherein the courts have hitherto widely differed.

SECTION II.

Of the Process, or Writs, in bailable Actions; and how to sue them out.

The affidavit of the debt, or cause of action, having been made pursuant to the statute 12 G. 1. c. 29. before-mentioned, the next thing to be done is, to take out the proper writ or process against defendant whereon he may be arrested. If the action be brought in the *King's Bench*, and defendant lives in *Middlesex*, this process is the *Bill of Middlesex*; if in any other county, a *Latitat*; and if the suit be in Common Pleas, it is a *Capias*; which writs differ from the writs used in unbailable actions as before-mentioned in this respect only, that in these bailable writs, by the statute 13 Car. 2. f. 2. c. 2. the cause of action must be particularly expressed; which is done by inserting the clause of *ac etiam** agreeable to the nature of the case (see *Appendix I.*); and as defendant is to be *arrested* upon the above writs, instead of being served with process, it is necessary also to get the proper *warrant* thereon at the respective

What is the proper process or writ whereon defendant is to be arrested.

[Appendix I.]

* For the different forms of bailable writs, with the *ac etiam*, together with remarks how far such *ac etiam* be necessary, &c. see *Appendix I.*

Sheriffs

Of the Process, or Writs,

sheriffs offices, in order to authorise such arrests. The mode of suing out such process and writs is as follows:

How to sue out process.

Get a warrant to prosecute, upon a 2s. 6d. stamp, to be filed with the proper officer who signs the writ, agreeable to statute 25 G. 3. c. 80. They may be bought either of the officer, or at the stationers. For the form of which, see ante, page 23.

Then if the action be in

B. R.

B. R.

C. B.

Bill of Middlesex.

**C. B.
Capias.**

Make a præcipe in the following form, provided you sue by bill of Middlesex.

Middlesex, ss. Bill for A. B. against C. D. case for 50l. upon promises (or as the case may be) returnable on Saturday next after the morrow of All Souls. Oath for 25l.

T. S. attorney.

Nov. 1, 1792.

Get a blank bill (four 6d. stamp), fill it up, carry the præcipe, bill, affidavit, and memorandum of warrant to the Bill of Middlesex office, and the officer will sign the bill; pay in Term 6d.; in vacation 10d; it is not to be sealed. Indorse the attorney's name and place of abode, and sum sworn to, and the day it is sued out, on the back. Then get a (a) warrant thereon at the sheriff's office, for which pay 4d. If sheriff cannot arrest defendant before the return thereof, sue out an alias, after that a pluries; signing each in term or vacation 2d. If defendant lives in any Liberty within the county of Middlesex, as in Westminster, sue out a non-omittas bill of Middlesex, for which pay as

Make a præcipe thus:

Middlesex to wit. Capias A. B. against C. D. late of Westminster in the said county, yeoman, trespass at Westminster, debt for 50l. returnable on the morrow of All Souls. Oath for 25l.

T. S. attorney.

Nov. 1, 1792.

If the capias is sent into any other county, to wit, Cambridge-shire, lay the trespass at Cambridge, or any other town.

Then get a blank writ (4s. 6d. stamp), fill it up, take præcipe, writ, affidavit, and memorandum of warrant to the proper filazer for the county; if the affidavit has not been sworn before, let your client swear it; then pay for the oath 1s.; signing capias 2s. 2d. (i. e. 1s. 2d. for signing, and 1s. for original); the filazer will sign it; get it sealed at the seal office; pay 7d. then get a (a) warrant directed to your officer, at the proper sheriff's office; pay 4d.

If not executed before the return, sue out a capias by continuance,

**B. R.
Alias and pluries bill.**

Non-omittas bill.

**C. B.
Capias by continuance.**

(a) For observations on the warrant, see the next section of this chapter.

in bailable Actions.

as for a common bill, and the sheriff will thereupon grant his mandate to the high bailiff of Westminster, who will make a warrant to his officer to arrest defendant. If the defendant cannot be found in Middlesex, and is to be met with elsewhere, get an office copy of the affidavit at the bill of Middlesex office, which will save a new one being made; pay for same 1s. and 1s. 7d. for the stamp; take it to the signer of the writs in the King's Bench office, and sue out a latitat thereon.

If a warrant to prosecute has been once filed, there needs no other; but add that to the præcipe thus:

"Bill of Middlesex, sued out — day of —."

Latitat. Make a præcipe, same as for bill of Middlesex, only say, latitat instead of bill; get a blank writ, (4s. 6d. stamp); fill it up, carry the præcipe, latitat, affidavit, and memorandum of warrant to the K. B. office to be signed; pay for signing 2s. 6d.; then to the seal office, Inner Temple-lane, to be sealed, for which pay 7d.

If defendant is to be arrested in London, go to one of the compters, get a warrant thereon, pay 4d.; if elsewhere, go to the proper sheriff's office; for warrant in Surry, Essex, or Kent, pay 6d.; in any other county 2s. 6d.; indorse the attorney's name, sum sworn to, and the day the writ issued.

If latitat be not executed before the return thereof, sue out an alias,

nuance, which is precisely the same as the first capias; only in the præcipe to the filazer say, cap. per continuance, for which the filazer charges 10d. signing; 7d. sealing.

Put the date of your first capias on the præcipe.

If defendant live in any liberty, sue out a non-omittas capias to empower the sheriff to enter therein pay signing 8s. 6d.; sealing 1s. 2d.

It was formerly held, that plaintiff lost his bail if he declared in any other county than that in which the capias issued; so that if defendant did not live in the county where plaintiff meant to lay his venue, or could not be found in the county where the capias issued, plaintiff, in order to arrest him in another county, was obliged to issue a testatum capias, grounded upon the supposition that a capias had been before sued out, and returned non est inventus, but which in fact seldom was sued out; wherein it was testified that the defendant lurked and wandered in the bailiwick of the sheriff to which the testatum was to be directed; the same as a latitat in the K. B.

But now by a rule, Hilary, 22 G. 3. the testatum writ is rendered useless; whereby "it is ordered by this court, that where an arrest shall be by virtue of a capias ad respondendum in any county, and bail shall be put in thereupon, and the plaintiff shall think proper

C. B.

Non-omittas capias.

Testatum capias out of use.

B. R.
Latitat.

B. R.
Alias and pluries capias.

"after-

Of the Process, or Writs,

alias, (called an alias capias, the *testatum* part being left out,) and after that a pluries; pay nothing for signing either; for sealing 7d.; make a *præcipe* as before, only say, alias or pluries capias, instead of "latitat," and put in such *præcipe* the day the first writ issued.

The pluries writ may be continued from term to term until defendant be arrested, unless plaintiff lies by for four terms, in which case a new latitat must be had.

Non-omittas. If defendant live within a liberty, sue out a non-omittas. If a latitat has been sued out before, pay nothing for signing and sealing; but if not, and it be sued out in the first instance, 2s. 6d. signing, and 1s. 2d. sealing.

If the defendant live in a county palatine, viz. Chester, Lancaster, or Durham, or any of the cinque ports, viz. Hastings, Romney, Hith, Dover, or Sandwich, then the latitat is to be directed accordingly (a).

"afterwards to declare in a dis-
"ferent county, it shall not be
"deemed a waiver of bail, but
"the recognizance of the bail
"shall be as effectual for the be-
"nefit of the plaintiff, and he
"may proceed thereon against
"the bail in the same manner as
"if the plaintiff had declared
"against the defendant in the
"same county in which the bail
"was put in."

So that now if the defendant cannot be found in the county where the first capias issued, the plaintiff's attorney, on taking an office copy of the affidavit marked by the filazer for the county where the first writ issued, may make out a capias (as before) into another county; pay 1s. for the copy of the affidavit, stamp and paper 1s. 7d., signing capias with the new filazer 2s. 2d. seal 7d. without having any return of the first capias.

N. B. The day when the first writ issued, and the county, should be marked on the *præcipe*. Imp. C. B. 14.

If defendant live in a county palatine or cinque ports, the writ, in that case, may now be a capias instead of a *testatum* capias as formerly, and the debt must be 20l., but the capias must be directed specially (a).

N. B. For the forms of the above writs, and their particular directions, see Appendix E.

(a) Upon this writ, the person to whom it is directed makes a mandatum, and by virtue thereof the sheriff or his officer arrests the defendant. Formerly it was contended by the bishop of Durham, that his officer was not bound to pay any obedience to such writ, upon the principle that the King's writ did not run there; but the court granted an attachment against the officer, and said, that the meaning of the term *breve domini regis non currit* is only that the court cannot write directly to the sheriff as they do in other cases. *Chapman v. Maddison*, Str. 1089.

By

in bailable Actions.

By statute 5 & 6 W. & M. c. 21. f. 4., and 9 & 10 W. 3. c. 25. f. 42., the officer who shall sign any writ or process to arrest any person or persons before judgment, shall, at the signing thereof, set down upon such writ or process, the day and year of his signing the same.

Officer must set down the day and year of signing writs,

And by a late rule of K. B. the custos brevium must mark the writs numerically as they are received by him. 3 D. & E. 787.

and custos brevium mark them.

The same observations and cases, as have been before made and cited respecting writs, and process in actions not bailable, will, for the most part, apply to the process in bailable actions. See therefore ante ch. 3. sec. 1. E. from page 85 to 94.

But it may be remarked, that in bailable actions the party should be more particularly cautious that his writ whereon he arrests the defendant, is in every respect regular; because if it be materially otherwise, as if a person be arrested on a *capias ad resp.* where one term intervenes between the teste and return, and therefore the writ be void, not only the proceedings would be null, but the party might maintain his action against the original plaintiff for false imprisonment; nor could he justify under such void process. *Parsons v. Lloyd*, 3 Wil. 344.

If void process be sued out, action will lie for false imprisonment.

SECTION III.

Of the Warrant and Arrest.

(A) The Nature of the Warrant, and its Requisites.

(B) How an Arrest is to be made.

(C) By whom, and when to be made.

(D) Of particular Times and Places when and where the Party is privileged from Arrest.

(E) Of the Sheriff's Fees upon an Arrest.

(F) Of the Defendant being rescued after Arrest.

(G) The

*Of the Warrant and Arrest.***3. (a) The Nature of the Warrant, and its Requisites.**

All writs directed to the sheriff.

The sheriff being the immediate officer to the King's courts, to him all writs and processses are generally directed, who is sworn to execute the same, without favour, dread, or corruption. Dal. Sh. 96. Plow. 74.

But he not executing them himself, a warrant to his bailiff is made out.

When therefore a writ has been regularly sued out, and directed to the sheriff of the proper county, that alone would be a sufficient commandment of the court whence it issued to justify the arrest of the defendant, provided the sheriff himself was to make such arrest; but as the sheriff never executes such writs himself, but has inferior officers under him for that purpose, the usual way is, for the writ to be delivered to his immediate deputy or under sheriff, who makes out his warrant to his bailiff or officer for the execution of such writ.

How to be made.

This warrant must be made agreeable to the nature of the writ, containing the substance thereof, and be in the high sheriff's name, under the seal of office. When so made, it is given to the attorney in the cause suing out the writ, who delivers it to the sheriff's bailiff or officer whom he usually employs in that county, and it operates as an authority to such officer to make the arrest.

How directed.

The warrant may be specially directed to a private person.

Must not be a blank warrant.

But it must not be a blank warrant to be afterwards filled up by the attorney, as such an one would be void, and the party arrested thereon discharged. *Burslem v. Fern*, 2 Wil. 47.

Must be had before the arrest.

The warrant must be had *before the arrest*. For if an officer arrest a person before he hath a warrant, though he may afterwards procure one, or though one may come to him to arrest the party for the same cause; yet such arrest would be wrongful, and the party grieved may have his action of false imprisonment. 4 Bac. Abr. 452.

Must not be made out before the sheriff has the writ.

The warrant must not be made out by any high sheriff, under sheriff, their deputies or agents, *before they have in their custody the writ* upon which such warrant ought to issue, on forfeiture of 10l. Stat. 6 G. 1. c. 21. s. 53.

Previous

Of the Warrant and Arrest.

Previous to this statute, if a writ was in fact sued out, though the sheriff had made his warrant before the writ came to his hand, it was held well. *Jones v. Green*, 2 Lev. 19. S. C. 1 Saund. 298.; but it is now otherwise.

Though formerly otherwise.

The warrant must have the same day and year set down thereon as shall be set down upon the writ itself, under forfeiture of 10l. to be paid by the persons who shall fill up or deliver out such warrant. Stat. 6 G. 1. c. 21. s. 54.

Must be dated as the writ.

The warrant must, before the service or execution thereof, be subscribed or indorsed with the name of the attorney by whom the writ was sued forth. Stat. 2 G. 2. c. 23. s. 22.

Must have the attorney's name thereon.

But the want of such subscription or indorsement on the warrant shall not vitiate the writ, but such writ shall be valid and effectual, provided the writ itself whereon such warrant is made out, be regularly subscribed or indorsed, according to the 2 G. 2. But the sheriff or officer making out the warrant, and not subscribing or indorsing the name of such attorney thereon, shall forfeit 5l., to be assessed as a fine by the court out of which such writ shall issue, one moiety to his majesty, and the other to the person aggrieved. Stat. 12 G. 2. c. 13. s. 4.

But not void for want thereof, if it be on the writ.

Though sheriff liable to a fine.

Before this statute of 12 G. 2. it was held, that although no attorney's name were to the writ, yet the process was not void; the attorney might be punished for the neglect, but the party was not to suffer. *Fowkes v. Jay*, P. R. 440. *Blackall v. Gould*, Ib. 441. But now such indorsement must be to the writ, though not necessarily to the warrant. *Grice v. Allen*, P. R. 442.

Practise formerly otherwise.

15. How an Arrest is to be made.

25.

An arrest must be by corporal seizing, or touching the defendant's body. No words will make an arrest.

An arrest, what.

A bailiff seeing the defendant at a little distance, told him, he arrested him; upon which the defendant, having

Bailiff must touch defendant.

K

ing

Of the Warrant and Arrest.

ing a fork in his hand, kept off the bailiff from touching him, and retreated into his house. An attachment was moved for, on the ground of a contempt; but was refused, because there was no arrest, nor rescue, and the bailiff was left to his action for the assault. *Genner v. Sparks*, 6 Mod. 173.

What touching
will do.

But any touching of the defendant's body is sufficient, though the bailiff only lays hold of his hand as he holds it out of the window. *Anon.* 1 Vent. 306.

In what cases
doors may be
broke open.

After the bailiff has once touched the defendant, but not till then, he may justify breaking open the house in which he is, to take him. *Anon.* 6 Mod. 105., where a variety of cases are cited.

Inner doors
no protection.

But even before the touching, if the bailiff gets peaceable entrance at the *outer* door of the house, he may break open any *inner* door to make the arrest, though it be the door of a lodger; for inner doors have no protection, but only outer doors and windows, which are intended for the security of the house. *Lee v. Ganfel*, Cow. 1.

C.

C. By whom, and when the Arrest is to be made.

In common
cases.

The bailiffs, or officers appointed by the respective sheriffs, are, for the most part, the persons who make arrests; but the warrant may be directed to a private person, who may act as a special bailiff for that purpose.

In franchises,
and what meant
thereby.

By the 5 G. 2. in franchises and peculiar jurisdictions, the proper officers there must make the arrest; but by franchises are merely meant particular *liberties*. Counties palatine are not included in that term. *Griffin v. Alcock*, 2 Barn. 400.

In counties pa-
latine.

In counties palatine the arrest is made by the sheriff, or his bailiff, by virtue of a mandate from the officer to whom the writ is directed. In particular liberties it is made by the bailiff of such liberty, by virtue of a mandate from the sheriff.

In liberties.

But

Of the Warrant and Arrest.

But this is only where no *non-omittas* is sued out; for under that writ the sheriff himself may enter the liberty, and make the arrest. If there be two liberties in a county, and the sheriff makes his mandate to the bailiff of one of them, who returns him no answer, he may, upon a *non-omittas*, arrest the defendant in either liberty. 5 Co. 92. Gilb. C. B. 29.

Sheriff may enter liberties with *non omittas*.

But should a sheriff make an arrest in any liberty without a *non-omittas* being sued out, the consequence would only be, that the sheriff would be subject to an action; for the arrest would stand good. Gilb. C. P. 27.

The consequence if he has none.

It was formerly doubted, how far any follower or assistant of a bailiff, could make the arrest, especially unless in the actual presence of the bailiff himself.

But it seems now settled, that the bailiff need not be the hand that arrests, nor need he be actually present, or even in sight, nor within any precise distance of the person arrested; but the arrest must be made by the authority of the bailiff, who ought to be *quodam modo*, present at the time. *Blatch v. Archer*, Cow. 65. B. N. P. 63.

How far it is necessary for the bailiff to be concerned in the arrest.

An arrest cannot be made after the return day of the writ or process; and although the suit be by original, yet the arrest must not be made between the return day and the *quarto die post*. 1 Sid. 229. Moore, 701.

Arrest must not be after return day.

But it may be made on the return day, and indeed at any time or place, provided it be within the county, subject to the exceptions now about to be mentioned.

But it may be on that day.

D. Of particular Times and Places when and where the Defendant is privileged from Arrest.

D.

If a defendant be a party to, or a witness in any cause, and is either going to, or attending upon, or returning from the court, he is, during that time, privileged from arrest, which is commonly called, being privileged *eundo, morando, et redeundo*.

Parties to, and witnesses in causes, privileged.

K 2

Nor

Of the Warrant and Arrest.

Courts have favoured this privilege.

Nor have the courts ever been inclined to restrict this privilege; on the contrary, every reasonable indulgence has been allowed to persons claiming it.

Thus it has been held, that the protection was not forfeited, because a man did not go home the direct road, but was arrested forty miles out of the way; since it might be, he went to buy a horse, victuals, or other necessaries for his journey. Neither is the law so strict in point of *time* as to require the party to set out immediately after the trial is over. Thus in the case of *Hatch v. Blisset*, Gilb. Cas. 308. the trial was at Winchester assizes, and was on *Friday* in the afternoon; but the party staid until after dinner on the *Saturday*, and in the evening, at seven, was arrested going home to Portsmouth, which is 20 miles; and the court held, she ought to be discharged, her protection not being expired, and a little deviation or loitering would not alter it. *Holiday v. Pitt*, Str. 985.

To the same effect is the case of *Lightfoot v. Cameron*, 2 Blac. Rep. 1113., where, after the rising of the court defendant went to dine with some friends at the King's Arms Tavern in New Palace-yard, where he was arrested, but was discharged on the ground of his privilege *redemptio*.

Whether it extends to inferior courts.

It is said, that this privilege extends to a party, or witness, who attends in inferior courts of record, as in the courts of London, or at the sessions. Com. Dig. Privilege, A.; but Q. see the cases there cited.

It does not, however, protect a person while attending commissioners of bankrupt to prove a debt. *Kinder v. Williams*, 4 D. & E. 377.

Clergymen how privileged.

Clergymen (by particular statutes, 50 Edw. 3. c. 5. & 1 Ric. 2. c. 16.) whilst they are performing divine service, and not merely staying in the church with a fraudulent design, are privileged from arrests.

What places privileged.

There are also certain *places* within which a person is privileged from arrest; such is every man's own house, if the

Of the Warrant and Arrest.

the outer door be shut; the King's court of justice, if the court be sitting; and the (a) verge of the royal palace, except it be on process out of the palace court; nor can an arrest be made in the king's presence. 3 Blac. Com. 289.

©. Of the Sheriff's Fees upon an Arrest.

The statute 23 H. 6. cap. 10. enacts, "That for an arrest, or attachment, the sheriff shall have 20d. and the bailiff who makes the arrest 4d.; and that the sheriff or bailiff who doth contrary, shall pay treble damages to the party grieved, and forfeit the sum of 40l.; one moiety to the king, and the other to the party that will sue; and that the justices of assize in their sessions, justices of the one bench and of the other, and justices of peace in their county, may determine the said offences."

In the case of *Newnham v. Lunn*, 5 Mod. 225. an action of debt was brought against a bailiff on this statute for taking 5s. 6d. for an arrest, and plaintiff recovered.

In general now, the master allows 10s. 6d. for an arrest in town, and 1l. 1s. in the country, and 1s. per mile for taking defendant to gaol if at any distance.

In the case of *Boldero and others v. Mosse and others*, two of the defendants having been arrested for 423l. each, by virtue of a writ directed to the chamberlain of the county palatine of Lancaster, a judge's order was obtained for staying proceedings upon payment of debt and costs. In the bill offered for taxation, the agent in the country made a charge of 4l. paid to the sheriff's officer for the arrests, being at the rate of 2l. each, which the master refused to allow, and struck off the overplus above the usual charge made in other counties, which is in general a guinea. Dallas now moved, that the master

(a) The verge of the palace of Westminster extends by stat. 28 Hen. 3. c. 12. from Charing-Cross to Westminster-Hall. 3 Blac. Com. 289.

Of the Warrant and Arrest.

might review his taxation upon affidavits, stating, that the charge made was such as was directed by a table of fees settled by the justices of the county in sessions in 1767, and which had been acted under ever since; the sessions having made the same under an idea, that they were authorised so to do by 32 G. 2. c. 28. The court, however, denied the motion, saying, that the justices in sessions had no authority to fix fees for the court of B. R., and that if bailiffs should in future exact more than the usual sum, they might be guilty of extortion in taking more than was allowed, *colore officii*. 3 D. & E. 417.

¶. Of the Defendant being rescued after the Arrest.

Rescue, an excuse to the officer, when.

If the defendant, after he has been legally arrested, be rescued by force from the officer *before* he is carried to prison, such rescue is an excuse to the sheriff, and he may make a return thereof when called upon for the writ.

How rescuer punishable, if returned such by sheriff.

A rescue is deemed an offence of such a nature, that whenever the sheriff makes a return of any one having been guilty thereof, the court will grant an attachment against such person in the first instance. *Anon.* Say. 121.

By attachment in a summary way.

And the court will proceed to punish him without going through the ordinary course of his being examined upon interrogatories, as no denial by him upon such examination could excuse him after having been returned guilty of a rescue by the sheriff, for the return is not traversable. *Rex v. Elkins*, Burr. 2129.

For such a return by the sheriff, is of itself a conviction of a rescue, and process immediately issues from the crown-office against the rescuer as upon a conviction; and if it is a false return, the remedy is by action against the sheriff for a false return. *The King v. Pember*, Cas. Temp. Hard. 112.

But

Of the Warrant and Arrest.

But the court will permit the defendant, in mitigation of the fine, to shew, that in fact there was no legal arrest, it being in the night, and the like. *Rex v. Minify and others*, Str. 642.

There was anciently a settled fine for rescuers; namely, 4 nobles; but the courts now fine according to their discretion, governed by the circumstances of the case. In the case of *Rex v. Minify*, they only fined the offender 1s.; and in the case of *Elkins*, 5l.

But the courts will not grant an attachment for a rescue, without a return thereof by the sheriff; a mere affidavit of the fact will not be sufficient; and this, whether it be a rescue on mesne process or in execution. *Sheather v. Holt*, Str. 531. *Anon.* Salk. 586.

No attachment without the rescue is returned.

Attachments for a rescue must be made returnable at a general return, though the original process was at a day certain. *Dominus v. Wilkins*, Str. 624.

How attachment returnable.

Besides this mode of proceeding by attachment, there are other remedies at the election of the party; namely, by action on the case or indictment. Com. Dig. tit. Rescous.

What other remedies.

But it is to be observed, that the return of a rescue is only good where the defendant has been rescued before he was committed to prison; for afterwards the sheriff is to take care of him at his risk; and even if he be ordered to be removed, or to be brought up to any court by *habeas corpus*, the sheriff must at his peril guard him; and should any danger be apprehended, he must take the *posse comitatus* to secure him; for in case of any rescue by any persons, except common enemies, the sheriff will be responsible; nor will such rescue be any excuse, but an action may even be brought against him for a voluntary escape. *O'Neil v. Marson*, Bur. 2812.

When a return of rescue is not good.

SECTION IV.

Of Bail to the Sheriff, or Bail below.

[Appendix, K.] For an account of the origin of bail in civil cases, and the alterations which in this respect have from time to time been made in the common law by different statutes, we must refer the reader to (*Appendix, K.*), confining ourselves at present to what more immediately concerns the modern practice.

A. The general Meaning of this Bail, and how given to the Sheriff.

B. The Statute 23 H. 6. considered, and herein,

(B 1.) *The Reason and Nature of the Statute.*

(B 2.) *To what Persons and Cases it extends.*

(B 3.) *How far the Sheriff is compellable to take Bail; and of the Number and Qualification of the Sureties.*

(B 4.) *Of the Nature of the Security, and how it must be made; with the Form of the Condition of the Bond.*

(B 5.) *What Variations in Point of Form will vitiate the Bond.*

(B 6.) *Of the Operation of the Bail Bond, and how far the Plaintiff in the Action is affected thereby.*

(B 7.) *Of proceeding against the Sheriff for acting contrary to the Statute.*

A. The general Meaning of Bail below, and how given to the Sheriff.

When the defendant is regularly arrested, he must either go to prison for safe custody, or enter into a bond, called a bail bond, with sureties, to be approved by the sheriff, conditioned for his appearance in court at the return of the writ. It is called *bail* (from the French word *bailer*, to deliver), because the defendant is bailed, or delivered to his sureties upon their giving security for his appearance, and is supposed to continue in their friendly custody, instead of going to gaol; and it is further denominated

Why called bail.

Of Bail to the Sheriff, or Bail below.

nominated bail *below*, in opposition to that bail which is afterwards put in when the defendant does appear upon the return of the writ, of which we shall presently treat, and which is called bail *above*.

The sheriff, if he pleases, may let the defendant go without any security, but that is at his own peril; for having once taken him, he is bound to keep him safely so as to be forthcoming in court; otherwise an action lies against him for an escape.

Sheriff may let defendant go without bail, at his own risk.

So an action lies if he did not arrest him when he had him in view, and might have arrested him.

But if the sheriff has him at the return of the writ, though after the arrest he let him go at large, it is sufficient. *Atkinson v. Matteson*, 2 D. & E. 177.

If forthcoming at return of writ it is sufficient.

The method of giving bail to the sheriff is, by entering into a bond or obligation with one or more sureties (*not fictitious persons* as in the former case of common bail, but real, substantial, responsible bondsmen), to insure the defendant's appearance at the return of the writ, which obligation is called the bail bond, and is in the following form:

How bail is given to the sheriff.

Know all men by these presents, that we, C. D. of, &c. E. F. of, &c. and G. H. of, &c. are held and firmly bound to
Esq. sheriff of the county of Middlesex, in the sum of
(double the sum indorsed on the writ) of lawful money of Great Britain, to be paid to the said sheriff, or his attorney, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, and each of us for himself, in the whole, our and every of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated, &c.

Form of bail bond.

The condition of this obligation is such, that if the above bounden C. D. do appear before (a) our lord the king at Westminster, on, &c. (if by bill, &c. a day certain; if by original, a general return day), to answer to A. B. in a plea of trespass, and also to, &c. (here insert the *actum*), according to the custom, &c. then this obligation to be void, otherwise to remain in full force and virtue.

(a) If in C. B. "Before the justices of our lord the king of the Bench."

The

Of Bail to the Sheriff, or Bail below.

The bail bond is on a double sixpenny stamp, and the sum indorsed usually written in the margin of the bond.

What sum bail
to be taken for.

By the statute 12 G. 1. c. 29. the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and indorsed on the back of the writ.

Generally double the sum
sworn to.

But the general practice is to take it in double the sum sworn to; and even if it be more, it shall not be bad, provided it appears to be through mistake, and without any intent to oppress the defendant. *Norden v. Horsley*, 2 Wil. 69.

13.

13. The Statute of 23 H. 6. considered.

The chief statute for the regulation of bail upon the arrest on mesne process, is the 23 H. 6. c. 9., which enacts as follows:

S. 5. That the sheriffs, and all other officers and ministers therein mentioned, shall let out of prison all manner of persons by them, or any of them arrested, or being in their custody by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place as the said writs, bills, or warrants, shall require.

S. 7. And that no sheriff, nor any of the officers or ministers aforesaid, shall take, or cause to be taken, or make any obligation for any cause aforesaid, or by colour of their office, but only to themselves, of any person, nor by any person which shall be in their ward, by the course of the law, but by the name of their office, and upon condition written, that the said prisoners shall appear at the day contained in the said writ, bill, or warrant, and in such places as the said writs, bills, or warrants shall require.

S. 8. And if any of the said sheriffs, or other officers or ministers aforesaid, take any obligation in other form by colour of their offices, that it shall be void.

S. 11. And that all sheriffs, &c. which act contrary thereto, shall lose to the party grieved, treble damages, and shall forfeit the sum of 40l. for every offence, one half to the king, the other to the informer.

S. 14.

Of Bail to the Sheriff, or Bail below.

S. 14. *And if the said sheriffs return upon any person cepi corpus, or reddidit se, that they shall be chargeable to have the bodies of the said persons at the days of the returns of the writs, bills, or warrants, in such form as they were before the making of this act.*

(B 1.) *The Reason and Nature of the Statute.*

(B 1.)

By the common law, the sheriff was not obliged to let persons to bail, but might insist upon keeping them in custody till the return of the process, unless they were replevied by the writ *de homine replegiando*. Hence the greatest hardships were endured, not only from the confinement itself, but especially from the scandalous extortions from defendants by the sheriffs, or their officers, in order to purchase their ease and favour in, or their temporary enlargement from prison. It was to remedy these grievances that this statute of Hen. 6. was made.

At common law sheriffs not obliged to let to bail,

Great oppressions therefrom;

to remedy which this statute was passed.

It was not passed to give the sheriff any *new* power, or to enable him to take bail in cases where he could not bail before; but in order to compel him to take bail in those cases where he might have taken bail, and refused so to do. *Bengough v. Rossiter*, 4 D. & E. 508.

Its intent and operation.

It was formerly the better opinion, so far as the majority of cases go, that this statute of H. 6. was a *private* statute, and ought to be pleaded; but it seems now otherwise: and in the case of *Samuel v. Evans*, 2 D. & E. 575. all the judges agreed, that it was unquestionably a general and *public* statute, of which the courts are to take notice without pleading. If, therefore, it appears in any manner upon the face of the record, that the bond was given under the statute to a sheriff *colore officii*, and is not a bond according to the statute, even after verdict judgment shall not be arrested, though the statute was never pleaded, but only the general issue *non est factum*. Defendant may bring it upon the record if he please, by craving *oyer* of the bond, and demurring; but without that, in an action by the assignee of the bail bond it is sufficiently notorious. *Vide* the above case, as all the other cases are there cited and animadverted upon. As it is a public statute, if the defendant unnecessarily

This statute is a public statute;

therefore need not be set out in pleading.

Of Bail to the Sheriff, or Bail below.

cessarily sets it out in his plea, the misrecital of a letter will be fatal. *Boyce v. Whitaker*, Do. 96.

(B 2.)

(B 2.) *To what Persons and Cases it extends.*

The statute only speaks of, and extends to persons arrested on mesne process.

Only to arrests on mesne process, not in execution.

The cases, therefore, of sheriffs taking securities, &c. by way of indemnifying them against any irregularity respecting executions of *fi. fac.* or persons in execution on *ca. sa.* do not affect any question respecting this statute. *Rogers v. Reeves*, 1 D. & E. 421.

Though by one case it seems otherwise.

But in the case of *Bracebridge v. Vaughan*, Cro. Eliz. 66. it was held, that where the marshal of the King's Bench taketh bond for the easement or delivery of a prisoner in execution, it is void by the statute of 23 H. 6. although he be not named in the statute; for divers persons are intended in the purview of the statute, which are not mentioned therein.

The bond may be taken without any actual arrest.

The arrest not being traversable.

It is not actually necessary for the party to be arrested in order to bring the bond within the statute; for the bail bond may be given without the party having been exposed to an arrest; and in an action by an assignee on such bond, the arrest need not be stated, for it is not traversable. *Haley v. Fitzgerald*, Str. 643.

But the bail bond must be taken by the sheriff before the return of the writ, or will be void. *Pullein v. Benson*, 1 Ray. 352.

It does not extend to courts of equity.

Ib.

This statute refers only to process in courts of common law. *Studd v. Aston*, C. B. T. R. 468.

Not to any attachments out of a court of equity.

Nor to attachments.

Nor to any attachment for a contempt, Str. 479.; for sheriff cannot take bail thereon.

Nor to indictments.

Nor to cases of bail on indictment at the quarter session. It may appear indeed, by the 5th section of the statute,

Of Bail to the Sheriff, or Bail below.

statute, as if sheriffs were authorised to take a *bond* for the appearance of persons arrested by them, under process issuing upon an indictment; and if that statute stood alone, they might perhaps, to a certain degree, have exercised that power; but even if such a power existed, it was afterwards taken away by the subsequent statute of 1 Edw. 4. c. 2. which passed in the next reign; and it is now settled, that it is the sheriff's duty in such case not to take a *bond* under this statute, but only a *recognizance* in the usual way. *Bengough and another v. Reffiter*, 4 D. & E. 505.

This statute extends only to such bonds, which any person in the sheriff's *ward* makes to him. 10 Co. 100.

If a sheriff, or gaoler, for the ease and enlargement of any who is in his ward, takes a *promise* to save him harmless, that, although the statute speaks only of an *obligation* with condition, is equally void, as being of equal mischief. 10 Co. 101.

It extends to promises as well as bonds.

The statute speaks only of obligations given to the sheriff, and does not extend to such as are given to the party—plaintiff. 1 Term. Rep. 422.

But not to bonds given to the party.

If, after defendant is arrested at the suit of plaintiff, a third person, together with him, gives a bond to plaintiff, with a condition, that if defendant should give such security as the plaintiff should approve of, for the payment of 90l. to him, or should render his body to him at the return of the writ, then the obligation to be void; otherwise, &c. such bond shall be good against the third person; because, although if the sheriff take a bond in another man's name to elude the statute, such bond is void; yet the plaintiff himself may give directions to the officer to take such bond as this to himself, and the agreement of the plaintiff makes it good. 2 Mod. 314.

For the plaintiff may direct officer to take any agreement he pleases.

So if a *capias* be taken out against the defendant, and a third person gives the plaintiff a bond that the defendant shall pay the money, or render himself at the return of the writ, it is a good bond, and not within the statute, because it is not by the direction of the officer, but by

Nor to a bond given to plaintiff by a third person for the ease of defendant.

Of Bail to the Sheriff, or Bail below.

by the agreement of the plaintiff, and there is no law that makes the agreement of the parties void; and if the bond was not taken by such agreement, it may be traversed. 2 Mod. 305.

Nor to any undertaking between the attorney of plaintiff and defendant.

So all undertakings or agreements made between the attorneys of defendants and plaintiffs shall be enforced by the court, even by the summary proceeding of attachment, they being officers of the court; because when an application is made against an attorney on his undertaking, it is by the plaintiff against him, to compel a performance of a contract entered into to him, and on that ground it is valid. The rule of court, therefore, stands perfectly clear of the regulations of the act of parliament.

The distinction to be observed in such cases.

The distinction between the above cited cases being, where the undertaking is to the plaintiff in the cause, and where it is made to the sheriff; if the latter, the form of the statute must be strictly pursued. *Rogers v. Reeves*, 1 D. & E. 422.

(B 3.)

(B 3.) *How far the Sheriff is compellable to take Bail; and of the Number and Qualification of the Sureties.*

Sheriff obliged to take good bail if offered;

The sheriff, or his officer, is now obliged to admit a man to bail, provided good and sufficient sureties be tendered, but not otherwise; and an action on the case will lie against him if he refuses.

Without any fee or reward.

As it is his duty so to do, he must not take money for it; if he does, he will be liable to an attachment. And although he should recover a verdict, upon a promise to pay him money if he would accept of the bail offered, yet on error brought, judgment will be reversed upon the ground of its being an illegal consideration. *Stotesbury v. Smith*, Bur. 927.

No actual necessity for two sureties.

By the words of the statute, "reasonable sureties of sufficient persons," (in the plural number,) it seems as if the statute meant to prescribe two sureties, and that the bail bond would be void with a less number. But this

clause

Of Bail to the Sheriff, or Bail below.

clause is intended only for the benefit and security of the sheriff, and is more for counsel and direction to him than for precept and restraint; as he is responsible for the appearance of the defendant after the arrest, and as he is compellable to take bail according to this statute, it is but just that he should have reasonable and good security for his indemnity; the statute therefore allows him two sufficient persons as sureties; and unless the defendant can find two bondsmen having sufficient within the same county, the sheriff is not obliged to let him to bail; but it does not compel him to take two: for if he chuses to run the risque, (it is at his peril so to do,) he may take one surety only, and the bail bond will not be void on that account. 10 Co. 101.

Sheriff if he pleases may take only one.

An action will not lie against the sheriff for taking insufficient bail; but if he hath not the defendant forthcoming to appear and answer the plaintiff, he may be amerced, provided the plaintiff has not accepted an assignment of the bail bond. Sal. 57. 6 Mod. 122.

No action against sheriff for taking insufficient bail.

(B 4.) *Of the Nature of the Security, how to be made, with the Form of the Condition of the Bond.*

(B 4.)

The security given to the sheriff must be a bond, the statute having prescribed that form of security, and declared that all others shall be void.

It must be a bond.

An agreement in writing, therefore, to put in good bail for a person arrested on mesne process, at the return of the writ, or surrender the body, or pay debt and costs, made by a third person, with the bailiff of the sheriff in consideration of his discharging the party arrested, was held void; for that was only a simple contract. *Rogers v. Reeves*, 1 D. & E. 418.

No agreement will do.

And this bond must be made in a peculiar mode, as directed by the act.

1st, The bond must be made to the sheriff himself. 2dly, It must be made to him, *as such*, by the name of his office. 3dly, It must be only for the appearance of the party, and for no other purpose. *Tb. & Cro. Eliz. 862.*

How such bond must be made.

The

Of Bail to the Sheriff, or Bail below.

1st, To the sheriff himself.

The bond must be made to the sheriff himself, and to no other person.

Not even to any bailiff.

Not even to their bailiffs; for the statute does not authorise sheriff's bailiffs to take obligations for the appearance of persons arrested. For though it mentions bailiffs, it only means bailiffs of franchises, and such officers as have the return of process; for where the process is directed to the sheriff, the indemnity must be to him. *Rogers v. Reeves*, 1 D. & E. 422.

Nor to any third person.

For although it be made to a third person, (by the nomination of the sheriff,) and upon such condition as the statute prescribes for the surety of the sheriff, it is void; because the act prescribes the bond to be made to the sheriff *himself*, and that is part of the essential form. 10 Co. 100.

2d, It must be made to him as sheriff.

It is not sufficient for it to be made to himself, but it must be made to him *as sheriff*. 1 T. R. 422.

It sufficiently appears, that a bond was taken by the *name of office*, when it is made payable *eidem vicecomiti & assignatis*. Str. 893.

Whenever it be taken *quatenus sheriff*, to let the obligor go at large, it is sufficient. 2 Keb. 108. 122. 1 Sid. 300.

3d, Condition must be for appearance of defendant.

The condition of the bond must be for the appearance of defendant on the *return of the writ*.

If the condition of the bond be not for the appearance of the defendant upon the very return day mentioned in the writ, it is void. Saun. 21.

But bail bonds need not pursue the very words of the process.

Bail bond need not pursue the very words of the process.

A special original was taken out returnable *coram domino rege ubicumque tunc fuerit in Anglia*, and the bail bond was without the words *ubicumque*, &c. and in an action upon it, it was objected, that by the statute of H. 6. (which was pleaded) the sheriff could take no bond but

Of Bail to the Sheriff, or Bail below.

but such as was to appear at the *place* mentioned in the writ, whereas this might be to compel an appearance out of England, if the king should happen to be so: but *per cur.* There are no set forms of words for these bonds; but if in substance they are to appear according to the design of the writ, it is sufficient. 2 Cro. 286. 2 Vent. 237. 2 Show. 51. 2 Lev. 180. Trin. 3 Geo. 2. *Philips v. Philips*, in *Scaccario* upon a *quo minus*, the bond was to appear in the office of pleas in the court of Exchequer at Westminster, and that was held well enough, though the process was to appear before the barons. We will understand, that by appearing before the king, is meant, before the king in his court, and not before the king in person. The plaintiff must have judgment, ante 153. *Shuttleworth v. Pilkington*, Str. 1155. *King v. Pippett*, 1 D. & E. 240.

So where the writ was to appear before the lord the king at Westminster, and the condition was to appear before the justices of the King's Bench at Westminster, the bond was held good. 2 Lev. 180.

So where the condition varied from the writ, in not setting out the *ac etiam*, or the sum mentioned therein, it was held immaterial. *Villiers v. Hastings*, Cro. Jac. 286.

If a sheriff takes one bail bond upon a debt by three jointly and severally, it is not according to the statute, being for a joint appearance to several actions. 6 Mod. 122.

(B 5.) *What Variations in point of Form will vitiate the Bond.*

(B 5.)

By sect. 8. it is said, all bonds *in any other form* shall be void.

Now there are two kinds of forms, *sc. forma verbalis*, and *forma legalis*; the first stands upon the letters and syllables of the act; the last is *forma essentialis*, and stands upon the substance of the thing to be done, and upon the sense of the statute; it is only, therefore, variations in point of the *forma legalis*, or matter of substance, that shall vitiate the bond:

Must be a variation in matter of substance;

L.

As,

Of Bail to the Sheriff, or Bail below.

as if without a condition,

As, if the sheriff takes a *single* bond of one in his ward who was bailable, it is void; for this bond wants the essential form prescribed by the statute, for the condition prescribed there is wanting. Ib.

or any addition to the condition.

So if the sheriff adds to the condition, that he shall be kept without damage against the king and plaintiff, &c. that shall make the whole condition void. Ib.

So if the condition be, to be a true prisoner, or to pay for his meat and drink.

Or if the sheriff adds any thing to the matter prescribed by the statute; as, to pay so much money for an horse, &c. this addition makes the whole bond void, for it is taken in other form (touching the substance matter) than is prescribed by the statute. Ib. Inasmuch as the condition should be for the appearance of the party, and for no other purpose.

But mere verbal variation shall not hurt,

But variations merely in matters of *forma verbalis* shall not vitiate, as where the condition of the bond was for the defendant to appear *in person*; whereas the words of the statute are, shall appear generally, without the words, *in person*, or, that he shall appear at the day, &c. *ad respondendum*; whereas the words *ad respondendum* are more than the statute prescribes: The bond shall not be void; because, though there is a verbal, there is not a substantial difference; the *way* of appearance being *in person*, and the *purpose* thereof being *ad respondendum*. 10 Co. 101. See also ante, (C 6.)

(B 6.)

(B 6.) *Of the Operation of the Bail Bond, so far as it affects the Plaintiff in the Action.*

By the 14 sec. of the statute, it seems, that notwithstanding such bail bonds, the sheriff shall be equally liable as before the statute, to be called upon by plaintiff to bring in the body, or on default thereof, to be amerced. So that although the sheriff takes a bail bond on this statute, yet it is at his peril, and only for his own security; plaintiff shall not thereby be concluded, but may still compel him to bring into court the body of defendant, by putting in good special bail. *Wolfe v. Collingwood*, Wil. 262.

Of Bail to the Sheriff, or Bail below.

(B 7.) *Of Proceedings against the Sheriff for acting contrary to the Statutes.*

(B 7.)

If any one, aggrieved by the sheriff's acting contrary to this statute, wishes to sue on the act, he must have his action on the case against the sheriff for his damages, which must be assessed by a jury, and then plaintiff may enter up judgment for *treble* that sum, according to this act.

He may also have another action for the penalty, for they are quite distinct matters, and recovered by different kinds of action, viz. case and debt qui tam.

A common informer may prosecute for the latter in debt; but the party aggrieved only can maintain an action on the case.

SECTION V.

Of Bail to the Action, or Bail above.

The defendant having put in bail to the sheriff, by entering into a bail bond, as before described, the next step to be taken is, his *appearance*, according to the condition of the bond, and the exigency of the writ; which appearance is effected by putting in *bail to the action*, commonly called *bail above*, in opposition to the bail given to the sheriff, usually termed *bail below*. What it is.

The *bail below*, or to the *sheriff*, only undertake for defendant's *appearance on the return day of the writ*, (*i. e.*) for his putting in *special bail to the action*; for his appearance can be effected by no other means; whereas the *bail above*, or to the *action*, are bound either to satisfy plaintiff his debt and costs, or to render their principal into his custody, provided judgment should be against defendant, and defendant himself should fail so to do. The nature of their undertaking.

If the defendant's attorney has undertaken to put in bail, which is sometimes the case, or if the sheriff, or the *bail below*, for their own indemnity, wish to put in special bail, either of them may do so, although the defendant himself should not consent, for otherwise they might suffer by defendant's obstinacy. May be put in against defendant's consent.

Of Bail to the Action, or Bail above.

In the treating of this extensive and important head of practice, we shall consider

A. When and how Bail is to be put in, and of the Notice thereof.

(A 1.) *In Town.*

(A 2.) *Before the Commissioners in the Country.*

B. Of accepting Bail, and filing the Bail Piece.

C. Of excepting to Bail.

D. Of perfecting Bail, and herein of the justifying, adding, opposing, and allowing of the Bail.

3. **A.** When, and how Bail is to be put in, and of the Notice thereof.

(A 1.)

(A 1.) *In Town.*

When to put in
bail above.
In town.

If defendant be arrested in London or Middlesex, he must put in special bail to the action.

In B. R.

In C. B.

In 4 days after the return of the writ or process, let it be made returnable when it may be. R. M. 8 Ann.

Except the action be by special original, then defendant has till 4 days after the quarto die post to put in bail.

In 4 days after the first day of term, provided the process be returnable the first return of the term; but if returnable on any other return, then 4 days after such day when it is made returnable. R. Trin. 30 G. 3.

N. B. How these days are reckoned, see Observations *infra*.

But if defendant be arrested in any other city, or county, then

Six days after the return of the process. R. M. 8 Ann.

Eight days after the first day of term, if process returnable the first return; if on any other return, eight days after such return day. R. Trin. 30 G. 3.

If

Carry

Of Bail to the Action, or Bail above.

If the suit be by bill, go to the office where the writ was signed, or to the sheriff's office, for a short copy of the writ, together with the sum sworn to; get a special bail-piece at the stationers, pay for same 2s. 1d. fill it up properly, with the name of the county, of the bail, &c. (for which see the remarks below); carry it to a judge's chamber, and having the bail with you ready, apply to the judge's clerk to take the bail, to whom you pay 4s. in term, 3s. in vacation.

He will take the recognizance, which is in the following form:

You do jointly and severally undertake, that if A. B. shall be condemned in this action at the suit of C. D. he shall satisfy the costs and condemnation, or render himself to the custody of the marshal of the marshalsea, or you will do it for him.

Are you content?

The bail-piece is left at the judge's chambers until bail be perfected.

The special bail-piece above-mentioned, is in the following shape and form:

Easter Term, in the 32d year of the reign of king Geo. the 3d. Sturmont and Way.

Middlesex, { A. B. is delivered to wit. { bail on a cepi corpus, to

C. D. of Cheap-side, London, mercer, and

E. F. of Newgate-street, London, hatter,

T. S. attorney, Sworn to At the suit of J. K. 500l.

4th May, 1792.

Carry an abstract of the writ, and the names and additions of the bail to the filazer, who will enter them in his book, kept for that purpose, and he, or his clerk, will attend at the judge's chambers, with the bail, to take the recognizance; which is done by an entry in the filazer's book, and not by a bail-piece, which entry he will afterwards draw up in proper form, if there should be occasion to sue the bail on their recognizance.

But in the filazer's absence, or if he cannot attend, the recognizance may be taken without him, before a judge, on a piece of parchment, stamped with a double 12d. stamp. R. H. 8 G. 2.

This is then called a bail-piece, and is as follows:

In the Common Pleas.

Easter Term, in the 32d year of the reign of king Geo. the 3d.

Middlesex, (H.) Capias against A. B. late of Westminster, yeoman, at the suit of C. D. for 200l. upon promise returnable in three weeks of Easter.

T. S. attorney } Affidavit for
for defendant. } 100l.

Taken and } Bail are, E. F.
acknow- } of Cheap-side, Lon-
ledged. } don, hatter; and
G. H. of Ludgate-hill, London, mercer. The defendant bound in 200l. each of the bail in 50l.

If the action be at the suit of a privileged person, the prothonotary's clerk will attend the court or judge.

Pay filazer, in term, 12s.; in vacation, 19s.; if taken at the judge's house, 3s. 4d. more.

If L 3

Form

Of Bail to the Action, or Bail above.

If the suit be by original, bail is taken by the filazer, as in C. B.; which mode of proceeding see opposite.

Form of the Recognizance.

You (naming the defendant if present) do acknowledge to owe the plaintiff 200l. (being double the sum sworn to). You (naming the bail) do severally acknowledge to owe unto the plaintiff the sum of 100l. a-piece, to be levied upon your several goods and chattels, lands and tenements, upon condition, that if the defendant be condemned in the said action, he shall pay the condemnation money, or render himself a prisoner to the Fleet for the same; and if he fail so to do, you (naming the bail) do undertake to do it for him.
R. 5 W. & M.

If the defendant be not present, and does not enter into the recognizance, then the bail are bound in double the sum the cause of action is sworn to amount to; otherwise only in the sum sworn to, and the principal in double the sum.

Memorandum of warrant necessary.

But both in B. R. and C. B. every attorney, at the time of putting in bail, must deposit in the hands of the judge's clerk, the memorandum, or minute of his warrant to defend, stamped with a 2s. 6d. stamp, which the judge's clerk is to receive, gratis, who is to deliver over the same to the proper officer. 25 G. 3. c. 80. s. 25.; which, vid. ante, p. 23. together with the form of such warrant, and where to be had.

How if defendant held to bail by a judge's order.

If defendant is held to bail by a judge's order upon an affidavit, such affidavit should, in B. R., be left at judge's chambers; and in C. B. be filed with the filazer for the county where writ issues, who will mark on bail-piece the sum for which bail is given.

Of the notice of bail having been put in.

Bail having been put in, it is necessary to give notice thereof, without delay, to the plaintiff, or his attorney. R. M. 16. c. 2.

Where bail are put in, in due time, the defendant is not bound to give notice, but the plaintiff must search in the filazer's book.

Which

Other.

Of Bail to the Action, or Bail above.

Which notice is in the following form :

*In B. R. A. B. plaintiff,
and
C. D. defendant.*

Take notice, that special bail was this day put in (if by original, say, put in with the filazer for the defendant, &c.) for the defendant in this cause, before the Honourable Mr. Justice Butler, at his chambers in Serjeant's Inn, Chancery-lane, London; and the names are, C. D. of Cheap-side, London, mercer, and E. F. of Newgate-street, London, batter. Dated the 4th day of May, 1792.

Yours, &c.

*Tho. Smith, attorney
for defendant.*

*To Mr. A. B. Red Lion-street,
attorney for Clerkcnwell.
plaintiff.*

*If they are the same as the bail to the sheriff, then add—
“and they are the same as are
“bail to the sheriff.”*

Otherwise if they be not put in, in due time. Dawkins v. Reed. C. B. T. R. 529.

*In C. B. A. B. plaintiff,
and
C. D. defendant.*

Take notice, that special bail was this day put in, with the filazer, for the defendant in this cause, before the Honourable Mr. Justice Gould, at his chambers in Serjeant's Inn, Chancery-lane, London; and the names are, E. F. of Cheap-side, London, batter, and G. H. of Ludgate-hill, London, mercer. Dated the 4th day of May, 1792.

Yours, &c.

*Tho. Smith, attorney
for defendant.*

*To Mr. A. B. attorney
for plaintiff.*

(A 2.) *Of the Time and Manner of putting in Bail before a Commissioner in the Country.*

(A 2.)

Formerly, special bail could only have been put in before a judge in town, which often occasioned, in country causes, great expence and inconvenience.

By this statute, the chief judges of the courts are empowered to appoint *commissioners* in the respective counties of England, for the purpose of taking recognizances of bail in causes commenced in the superior courts.

Which are to be taken in the same manner, and by such recognizances and bail-pieces as the judges themselves

Of Bail to the Action, or Bail above.

selves take them; when taken, they are to be *transmitted* to the court where the action shall be depending.

An *affidavit* also is to be made, of the due taking thereof, by some credible person present at the time.

The commissioners are further authorised to take *justifications of bail by affidavit*, and to examine the bail upon oath as to the value of their estates.

The time when bail must be put in, in country causes, has been already mentioned (*ante*, A 1.); namely,

B. R.

C. B.

When bail to be put in, in country causes.

In six days after the return of the writ. R. M. 8 Ann.

If by original, 8 days, (i. e.) 4 days after the quarto die post.

In eight days after the first day of term, if writ returnable the first return of the term; if on any other return, then 8 days after such return day. 30 G. 3. R. Trin.

For an explanation of these rules, see *Observations infra*.

But in some cases, the recognizances should be transmitted within a certain number of days after the caption, agreeable to the rules of 8 W. 3. in B. R. and 10 G. 1. in C. B.; for an explanation of which see also the *Observations infra*.

How bail to be taken, &c. before a commissioner.

Take a bail-piece, as before directed in town causes, properly filled up; and go with the bail to a commissioner of the proper court, who will take the recognizance, for which pay in B. R. 6s. in C. B. 2s.; you may carry also, at the same time, an affidavit of the justification of the bail, ingrossed on treble 6d. stamp paper, which may be sworn before the same (a) commissioner, and which it is best to do at this time, in case there should not be time to send it after exception. Then take an affidavit of the due taking of such bail, made by some person present at the time, ingrossed on treble 6d. stamp paper, to be sworn before some other commissioner (not the same who took the recognizance); after which annex the bail-piece thereto, and send them to the agent in town, that he may get it properly put in, (i. e.) allowed and filed within the time above-mentioned. See the late rule of court to be observed by commissioners in taking affidavits of illiterate persons, Sect. I. of this chapter, C.

(a) This affidavit of justification must not be sworn before the same commissioner before whom the affidavit of the due taking of the bail was sworn.

The

Of Bail to the Action, or Bail above.

The agent having received the same,

B. R.

C. B.

Carries the bail-piece, and the affidavit of the due taking thereof, to the chambers of one of the judges of this court, and there files the same, together with the memorandum of the warrant to defend, agreeable to 25 G. 3. for which see ante, p. 23. for the filing whereof he pays in term 5s. in vacation 6s.

Applies to a judge for his allowance, for which he pays in term 5s. in vacation 12s. which he files with the filaxer of the proper county where the bail was taken; pay for filing thereof, in term or vacation, 6s.

If suit be by original in B. R. same mode taken as in C. B.

When the bail is thus put in, it is usual for the defendant's agent to give notice thereof to the plaintiff's agent, and at the same time to send him a copy of the affidavit of the justification; but this notice is given out of civility, for there is no necessity for it when bail is put in, in due time. Of the notice in such case.

In B. R. { A. B. plaintiff,
Between { and
 { C. D. defendant.

In C. B. { A. B. plaintiff,
Between { and
 { C. D. defendant.

Take notice, that the bail-piece in this cause, with the affidavit of the due taking thereof, was this day filed with the Right Honourable Lloyd Lord Kenyon, at his chambers in Serjeant's Inn, Chancery-lane, London. — Dated the 4th day of May, 1792.

Yours, &c.
T. S. agent for defendant.
To Mr. W. H. agent
for plaintiff.

Take notice, that special bail was, on the 1st day of May instant, put in for the above-named defendant, before J. S. Esq. a commissioner appointed to take special bails in and for the county of B.; and the names are, A. B. of Bedford, in the county of Bedford, clothier, and C. D. of the same place, farmer, which have been allowed by the Honourable Mr. Justice Gould; and the bail-piece, together with the affidavit of the due taking thereof, is filed with the filaxer of the said county. Dated the 4th day of May, 1792.

Yours, &c.
T. S. agent for defendant.
To Mr. W. H. attorney,
or agent for plaintiff.

OBSERVA.

Of Bail to the Action, or Bail above.

OBSERVATIONS.

1. *Upon the Time of putting in Bail in Town and Country, and of transmitting the Bail-piece.*
2. *Upon the Bail-piece and Recognizance.*
3. *Upon the Extent of the Liability of the Bail.*
4. *Upon the Notice of Bail having been put in.*

7.
When bail may
be put in, in
town.

Bail may be put in before the return of the writ after an arrest, but never before the arrest, without consent; for if plaintiff dislike such bail, he may cause defendant to be arrested, and a bail bond given to the sheriff in a regular way. *Huggins v. Bambridge*, Bar. 83.

In B. R.

In B. R. the four days allowed for putting in bail are reckoned, *exclusive* of the return day; and where the fourth day is Sunday, the party has all the next day to put in bail.

So that if the latitat be returnable on Wednesday, the defendant may put in bail any time on the Monday. *Studley v. Sturt*, Str. 782.

Bail cannot be put in after final judgment. *Jackson v. Knight*, Bar. 92.

In C. B.
Explanation of
the rule of Trin.
30 Geo. 3.

In C. B. also, the days allowed for putting in bail are reckoned in the same way; and the meaning of the rule of Trin. Geo. 3. mentioned above, is, that four or eight days, as it may be a town or country cause, *exclusive*, shall be allowed in *full term*; if therefore the *capias*, which must be returnable on a general return day, be made returnable on the first general return of any term, which is always before the first day of term, then the defendant shall have four or eight days from the actual first day of term; but if the *capias* be returnable on the second, or any other return, which must necessarily fall in full term, then the defendant is only allowed four or eight days, as the case may be from such return day. As for instance, the first return of next Trinity term is on the morrow of the Holy Trinity, which is June 4, but term does not begin till June 8; now if a *capias* in any town cause be on that first return, defendant will have till the 12th of June, being four days *exclusive* from the 8th, to put in bail; whereas if a *capias* be returnable on the

Of Bail to the Action, or Bail above.

the second return, which is in eight days of the Holy Trinity, June 10th, defendant would only have four days from that day, viz. till the 14th, to put in bail.

The same mode of reckoning also applies to the time when the bail is to be put in which has been taken before a commissioner. For by being put in, is not meant that it must be taken by the commissioner, but that the bail-piece must be actually filed within that time with one of the judges in the King's Bench, or with the proper filazer in the Common Pleas.

What time allowed when bail taken before a commissioner in the country.

The rules of 8 W. 3. in B. R. & 10 G. 1. in C. B. which, prima facie, allow a longer time for the transmitting of the bail-piece, are often confused with the rules of 8 Ann. and 30 G. 3. above-mentioned, settling the time for the putting in of the bail. But I conceive their operation to be perfectly independent. The rules of 8 W. 3. in B. R. & 10 G. 1. in C. B. only apply to those cases, where bail is taken before a commissioner in a vacation, and there is a *length of time* between the taking thereof and the return of the writ, in which case they direct such recognizances as are taken within 40 miles of London, to be transmitted within eight days after the *caption* in B. R. and 10 days in C. B.; and if taken above 40 miles, in 15 days in B. R. and 20 days in C. B. and empower the judges to accept such bail. But when the bail is not taken by the commissioner in the *vacation*, or when there is not that length of time, then the other rules take effect, and the bail must be *put* in within six or eight days after the *return*, as above-mentioned. That this is the true construction of the statute, and that it only alluded to the transmitting of bail in vacation, appears from the provision in the statute—*unless all the judges be on the circuit, and in such case, as soon as any one is returned*—as all the judges are never on the circuit in term time,

Explanation of the rules 8 W. 3. & 10 G. 1. & 8 Ann. & 30 G. 3.

It is to be observed, therefore, that when bail is taken before a commissioner in the vacation, and there is above 10 or 20 days, as the case may be, between the taking thereof and the time when it ought to be put in, such recognizances should be transmitted agreeable to the above rules, 10 W. 3. & G. 1. within the 10 or 20 days, as the

the

Of Bail to the Action, or Bail above.

the distance may be, and when transmitted to the judge for his allowance, notice thereof should be given to plaintiff's attorney. Thus all the rules have their effect.

2.
Of filling up the
bail-piece.

The name of the county in the bail-piece should be the same as that in the writ.

In the Common Pleas, bail are bound in a sum certain; but in the King's Bench they are not bound in a sum certain (except the action be by original), but only undertake that the defendant shall pay the condemnation-money, or render his body to prison, and the recognizance being general, must be reduced by the judgment to a certainty. Salk. 102.

Whether it may
be amended.

If the bail-piece be taken, and mistake be made in the name of the cause, as *Furrers v. Cooke* instead of *Farrers v. Cooke*, court will not amend it, unless bail consent. *Farrers v. Cook*, 1 Barn. 214.

A recognizance of bail was ordered to be amended, by making it, in an action of trespass and assault, ad damnum of 2000l. instead of 200l. on assumpsit; two actions were depending between the parties, and bail was put in to the action of assumpsit before the bail now amended was put in, which was intended to have been in the action of assault, but by mistake of the filazer was taken in the other action, contrary to the instructions given. *Faget v. Vanthiennen*, Bar. 59.

3.
Of the extent of
the liability of
the bail.

Formerly it was the practice of the court, that if a man became bail for another in any sum of money, as 10l. he was thereby bail in all actions brought in the same term by the same plaintiff against that defendant, let the sum be ever so great. 6 Mod. 266.

This was, as C. J. Holt himself acknowledged, an extraordinary and most inconvenient practice; to rectify which, a rule was made, that where the plaintiff recovered a greater sum than was laid in the action, the bail should not be chargeable in *ista actione*. By the construction of this rule, the opposite extreme was fallen into; so that if a plaintiff brought an action, with an

Of Bail to the Action, or Bail above.

ac etiam for 40l. and recovered 100l., the bail, agreeable to C. J. Holt's opinion, was not liable at all, even for the 40l.; for he held, that the recognizance was to answer the condemnation, and since that could not be, he was bound to nothing. *Genbaldo v. Cognoni*, Salk. 102.

This practice was surely as extravagantly favourable, as the former was rigorous towards the bail.

Not, however, that the doctrine laid down by C. J. Holt, seems to have been altogether adhered to; for in the case of *Wells v. York*, it was agreed to be settled by the court, that on a declaration of 200l. the bail was liable to all actions made under the same sum, but not to actions above that sum. 3 Keb. 16.

But the extent of the liability of bail on their recognizance, during the reigns of Car. 2. W. A. & 1 G. seems to have been a matter of much doubt; the question being, Whether, if the plaintiff recovered a greater sum than in the *ac etiam*, the bail should be answerable to the sum mentioned therein, or be wholly discharged. The case of *Martin v. Moor*, at length, settled the point, upon the grounds of reason and justice; the sum sworn to was 80l.; plaintiff recovered 104l.; court resolved, that as, on the one hand, there was no colour to subject the bail to more than they were bound, let the plaintiff's demand be ever so great; so, on the other hand, there was no reason the plaintiff should suffer by his moderation in taking bail, but the recognizance should be considered as an agreement to pay 80l. or deliver up the defendant; and therefore they made a rule, that the goods of the bail taken in execution, should be delivered on the bail's paying the 80l. and the costs, or else the goods to be sold, and the surplus returned. Str. 922.

Agreeable to which is the case of *Jackson v. Hassell*. Do. 330.

So that in B. R. bail are not liable beyond the sum sworn to and the costs, let the plaintiff recover ever so great a sum.

But

Of Bail to the Action, or Bail above.

But in C. B. the practice, by a late case, has been determined otherwise; and that the bail are liable for the whole, if it does not exceed the *penalty* of bail bond. *Mitchell v. Gibbons*, 1 C. B. T. R. 76.

4.
Of the notice of
bail having been
put in.

Bail, when put in, are either *absolute* or *de bene esse*. They are *absolute* when the plaintiff consents to, and approves of them in the first instance. They are *de bene esse* when put in without such consent; i. e. *conditionally*, provided no exception be made against them.

When neces-
sary.

When put in *de bene esse*, notice of their being put in should be given in B. R.; but not necessary in C. B. if put in, in time; but otherwise, it is. *Dawkins v. Reid*, C. B. T. R. 529.

What it should
contain.

This notice should be properly entitled, *Loft. 237.* and particularly specify the names of the bail, *id. 187.* their degrees, *id. 281.* their trade or vocation, *id. 187.* 6 *Mod. 24.* and not merely the parish or town, but the very street or place where they live, *Loft. 72. 194.* in order that the plaintiff may the more easily find them out.

In B. R. if the same bail as were given to the sheriff become bail above, it is usual to mention, that they are the same in the notice, because they cannot in this court be excepted against, but they may in C. B.; therefore, in that court, there is no need to mention this circumstance.

B. Of accepting Bail, and filing the Bail-piece.

The bail, when put in, must be either *accepted*, or *excepted to*, by plaintiff.

If the bail are accepted, it only remains for the defendant's attorney to file the bail-piece, which must be done within *twenty* days after. R. T. 13 Car. 2.

In B. R.

When the suit is by bill, and the bail are accepted, the bail-piece is taken and filed with the signer of the writs, for which is paid 4d.; if by original, it remains with the filazer.

In C. B.

If the bail are accepted, the bail-piece is filed with the filazer.

The

Of Bail to the Action, or Bail above.

The same practice prevails in country causes, when bail was taken before a commissioner.

If excepted to, bail-piece ought to be filed within twenty days after justification. Tr. 13 Car. 2. B. R. Mich. 6 Geo. 2. C. B.

OBSERVATIONS.

In C. B. the judges in the treasury refused to order a bail-piece to be filed, *twenty* days being elapsed since the caption; the rule being in such case, that it shall not be filed without leave of the court. But the court being moved afterwards, upon the affidavit of defendant's agent that he received the bail-piece in due time, but that it was omitted to be filed by his clerk's neglect, they ordered it to be filed. *Aucher v. Hamilton, Bar. 65.*

If the bail-piece not filed in time, court will, in certain cases, permit it to be filed afterwards.

Every bail taken before, or upon the *continuance* day, shall be a bail, and filed of the preceding term; and every bail taken *after* the continuance day, shall be a bail, and filed of the subsequent term, and not otherwise; but where any new bail is added to any other bail taken on, or before the continuance day, the same shall be taken and filed as of that term in which the bail was first put in. *Gilb. Prac. B. R. 341. Same in C. B.*

Of what term the bail shall be.

If defendant neglects to file the bail-piece, and plaintiff wants afterwards to sue on the recognizance, he may file it himself, which is often done; but if defendant is rendered in discharge of his bail, he must file it in order to get an exoneretur marked on it; as will be shewn in the next section.

Why bail-piece must be filed.

If bail be not excepted to within time, viz. *twenty* days after notice, affidavit may be made by defendant of the service of notice of putting in bail, upon the back of the bail-piece, and he may file the same with the master, for which no fee need be paid. *R. M. 16 Car. 2.*

How defendant may get it filed if bail not excepted to.

C. Of excepting to Bail.

C.

If plaintiff disapprove of the bail put in, he is at liberty to except to them, which exception must be made

In

Of Bail to the Action, or Bail above.

In B. R.

In C. B.

When, and how
such exception
to be made.

Within twenty days after
notice given of putting in bail,
otherwise void. R. M. 16
Car. 2. R. T. 8 W. 3.

Same time as in B. R.

It must be in writing in the
judge's book before whom bail
was taken. The form of the
entry is, "I except against these
bail." R. M. 8 Ann.

It must be in writing in the
filazer's book, or on the bail-
piece.

T. S. plaintiff's attorney.

After exception made, notice
thereof, in writing, must be
given to defendant's attorney,
which is as follows:

Same notice in writing neces-
sary in C. B.

A. against B. I have ex-
cepted against the bail put in for
defendant in this cause.

Yours, &c.

T. S. plaintiff's attorney.
To Mr. A. B. attorney
for defendant.

If the suit be by original, it is
the same practice as in C. B.

In B. R.

In C. B.

In country causes, when Bail taken before a Commissioner:

The bail must be excepted
against the same as above, with-
in twenty days after notice of
bail being filed at the judge's
chambers, and notice of such
exception must be given to de-
fendant's agent in town.

The same as above. Excep-
tion to be made under the bail-
piece left at the filazer's, and
notice thereof given to plaintiff's
agent in town.

OBSERVATIONS.

(C 1.) On the Time of Excepting.

(C 2.) On the Manner of Excepting, and the Notice thereof.

(C 3.) On the Grounds of Exception, and what are good.

(C 4.) What shall be deemed a Waiver of Exception.

(C 1.)
Of the time of
excepting.

If plaintiff thinks the bail put in, or transmitted, in-
sufficient, he may except to them, and thereby obliges
them to appear, and justify by swearing themselves house-
keepers,

Of Bail to the Action, or Bail above.

keepers, and worth double the sum for which defendant was arrested, after their own debts are discharged.

If bail are not excepted to within the *twenty* days, the bail become absolute; and the bail-piece, upon affidavit being made of the service of notice of bail being put in, may be *filed*; see ante, B. If excepted to, defendant must perfect his bail within four days after exception taken. Must be within 20 days,

An exception entered after the expiration of the twenty days, is of no validity. or not good.

Though bail be irregularly put in, if notice thereof be given, and no exception made within *twenty* days, they shall stand.

Thus where a capias indorsed for bail being issued, defendant previous to the return of the writ, and to his being arrested, put in bail before a judge, and gave notice thereof to plaintiff's attorney, plaintiff regarded not the notice, but caused defendant to be arrested; and he being in custody, moved for a superseas, and had a rule to shew cause. It appearing that plaintiff had not excepted against the bail within twenty days after notice thereof, the court was of opinion that the bail ought to stand, and the rule was made absolute. *Huggins v. Bambridge*, Bar. 81. Bail irregularly put in, if not excepted to, will stand.

Exception to bail must not only be within due time, but also before any step is taken by plaintiff, which may be construed a waiver of exception. For which see post, C. 4. of this section.

(C 2.) *Of the Manner of excepting, and the Notice thereof.* (C 2.)

The manner of making the exception, and of giving notice, has been shewn above, C.; and it is necessary that both should be done; the one without the other is insufficient; nor will a *verbal* notice be good. *Satchwell v. Lawes*, Bar. 88. *Goswell v. Hunt*, Bar. 101. Cas. of Prac. C. B. 33. Verbal notice not good.

M

But

Of Bail to the Action, or Bail above.

Unless defendant proceeds afterwards.

But if plaintiff gives a verbal notice of exception to defendant, or no notice thereof, and defendant afterwards proceeds by giving notice of justification, he has waived the irregularity with respect to *himself*; but it is not waived as relating to the *sheriff*. No attachment therefore will, in such case, lie against the sheriff. Vid. post, sec. 8. *B. Cohn v. Davis*, 1 C. B. T. R. 80. *Rogers v. Mapleback*, 1 C. B. T. R. 106.

(C 3.)

(C 3.) *Of the Grounds of Exception.*

As the same objections to the bail, which would be reasons for *excepting* to them, would also be good grounds for *opposing* the bail at the time of their justification, we shall, to avoid repetition, consider them under the last head; for which, see post, D. 3.

If bail below become bail above, they cannot be excepted to in B. R. Otherwise in C. B.

But it may be proper here again to mention, that in B. R. if the bail *below* become bail *above*, you cannot except to them; but in C. B. you may. See more on this head, and also how plaintiff, in such case, should proceed in B. R. post, sec. 7. D.

Bail, however improper, will stand, unless excepted to.

It is also to be observed, that if improper persons be put in as bail, though even excluded by any rule of court, yet that does not render the bail-piece *ipso facto* a nullity; but it is still incumbent upon plaintiff, if he disapprove of them, to except regularly to them, for otherwise he waives the objection, and they will stand good; nor can he take an assignment of the bail-bond, and proceed as if no bail were put in. Do. 467. N.

(C 4.)

(C 4.) *What shall be deemed a Waiver of Exception.*

Declaration is a waiver, unless delivered *de bene esse*.

If plaintiff, before special bail be put in, deliver a declaration *in chief*, (for the meaning of which see the next chapter,) or declares generally, *i. e.* without indorsing his declaration, as filed or delivered *de bene esse*, or conditionally, it is a waiver of the bail, and of exception thereto. So, if after exception, and before justification, he declares, as above-mentioned, it is a waiver, and the bail need not justify. *Friend v. Mullens*, Cal. of

Of Bail to the Action, or Bail above.

of Prac. C. B. 81. *Walsh*, assignee, v. *Hadcock*, ib. 156.
R. M. 8 Ann. (C.) B. R.

But he may declare, *de bene esse*, or conditionally, *i. e.* if before bail put in, conditionally, until good bail be put in; if after, until the bail put in do justify. *Lister v. Wainhouse*. Bar. 92.

The declaration should, in such case, be marked *de bene esse*, or conditionally. *Mayo v. Weaver*, Bar. 105.

Nor must he take any further step in the cause until the bail be put in, or have justified, as the case may be; for if he demands, or accepts a plea, that will operate as a waiver. *Lister v. Wainhouse*, Bar. 92.

So demanding or accepting a plea, is a waiver.

In C. B. where the bail below are put in as bail above, taking assignment of the bail bond is not a waiver of the exception. *Claxton v. Hyde*, Bar. 90. P. Reg. 68.

When taking assignment of bail bond is not a waiver.

But otherwise in B. R. R. M. 8 Ann. Sal. 97.

D. Of perfecting Bail.

D.

When bail are excepted to, and due notice thereof given, it is necessary that bail should be *perfected*; to do which they must appear in open court, and swear that they are housekeepers, and are worth, after all their debts are paid, double the sum they are bound for; and this is called *justifying*. If the same bail which have been already put in, cannot, or will not justify, other bail are to be *added*, *i. e.* put in, in their stead, who must justify. Should the circumstances or characters of the bail be suspicious, plaintiff may, at the time when they are justifying in court, examine and interrogate them accordingly; which is called, *opposing* bail, and which is done to induce the court to reject them. But should no such opposition be made, or notwithstanding such opposition, the court should still *allow* them, the bail are then said to be *perfected*. Under this head, therefore, of *perfecting* bail, it will be necessary to consider the mode of *justifying*, *adding*, *opposing*, and *allowing* bail.

What it is.

Of Bail to the Action, or Bail above.

In B. R.

In C. B.

When bail must justify.

If notice of exception be given in term-time, bail must justify in 4 days after such notice; but if exception be entered in vacation, then upon the first day of the subsequent term. E. 5 G. 2.

Same as in B. R. R. Trin. 3 & 4 G. 2. & 8 G. 3.

What notice necessary.

Notice, however, must be given within 4 days after the exception, though in vacation, of defendant's intending to justify the first day of the next term; or plaintiff may sue on the assignment of the bail bond.

In C. B. two days notice, whether the same bail, or additional ones—exclusive, as in B. R. (i. e.) one exclusive, and the other inclusive. Notice 12th for 14th.

Notice also must be given when the bail are to justify.

If the same bail as were put in are to justify, one day's notice of justification is sufficient, (i. e.) on the 12th for the 13th.

How to justify in court.

When bail justify in court, go the evening before to the clerk of the judge before whom bail was taken, and desire him to bring the bail-piece into court the next day, who will do so accordingly; pay him 2s. 6d.; prepare an affidavit of the service of notice of justification, and get it sworn; indorse it with the names of the parties, and give it to the counsel, with 10s. 6d. to move to justify the within bail. Your bail are then brought into court, and sworn; pay 9s. and a rule is drawn up in the evening by the clerk of the rules for the allowance of the bail, for which pay 4s. a copy whereof must be served on plaintiff's attorney. The bail-piece should afterwards be obtained from the judge's chambers, and filed with the master.

When bail justify in court, having got sworn affidavit of service of notice, for which pay 2s.; desire the filazer to attend at Westminster with the bail-book or bail-piece; pay him 5s. 4d.; give your affidavit to a serjeant to move to justify the bail, with a fee of 10s. 6d. and call in and swear your bail; pay 3s. 6d.; and get the rule for the allowance of the bail at the Secondaries office, pay 4s. 6d. serve plaintiff's attorney with a copy, and shew the original rule at the time.

If bail are to be added, how to justify.

If the bail put in cannot, or will not justify, and others instead

When bail are to be added, take them to the judge's chambers

Of Bail to the Action, or Bail above.

stead of them are added to justify, two days notice must be given, that is, on the 12th for justification on the 14th. Sunday is no day; therefore notice on Saturday for Monday is not a good two days notice. So if one fresh bail be added in lieu of one of those before put in, and the notice is accordingly.

bers with the filazer; pay for adding 7s. 4d. and then justify as above.

Bail are added, by going before a judge, and putting the names of such fresh bail on the bail-piece in B. R. and in the filazer's books in C. B. Fresh bail may be added, and justify in court the same morning; for each bail added pay 2s.; and judge's clerk, for bringing bail-piece into court, 2s. 6d. The bail-piece is given to the master in B. R.

The added bail must justify in court, within the four days after exception, without waiting for any new notice, for the plaintiff need not except again to such new bail; but if they do not justify, may proceed on bail-bond.

When added, bail must justify.

You may put in bail and justify at the same time, by giving notice for that purpose two days exclusive previous thereto; which is done as follows: Fill up a bail-piece, take it to the judge's clerk at Serjeant's Inn, who will take the recognizance; pay 4s. and 2s. 6d. for delivering it to the master in order to justify; have affidavit of service of notice ready, which give to counsel to move. Imp. B. R. 140.

How bail may be put in and justified at the same time.

Bail at present justify in open court in Serjeant's Inn Hall, and the notice must therefore mention that place.

It is to be observed, that whenever bail justify in open court, the plaintiff may, by counsel, oppose such bail, by examining them as to their sufficiency or competency. For which see infra, D. 3.

But where there is a confidence between the attornies, they may consent that the bail shall justify at a judge's chambers, for which pay 2s.; and 10s. 6d. used to be paid the plaintiff's attorney for such consent; but the court always reprobated the practice, and lately Lord Kenyon said, that it should no longer be endured.

May justify by consent at judge's chambers.

Of Bail to the Action, or Bail above.

In B. R.

How to justify bail taken in the country before a commissioner.

Notice having been given of bail being duly filed, and a copy of the affidavit of justification sent, if plaintiff excepts to them, notice of justification must be given as before, only the words "by affidavit," added.

Affidavit of the service thereof must be made, and the affidavit of justification and bail-piece being carried to Westminster, either by the attorney, if not filed, or by the judge's clerk, if it is; counsel must move to justify. The affidavit is then read in open court, for which pay 9s. and afterwards the rule for allowance is made out, for which 4s. is paid.

In both courts, the usual way amongst fair practitioners is, to accept the justification by filing the affidavit with the judge's clerk in B. R. and the filaxer in C. B. at the time of filing the bail-piece; if not done then, to accept it by filing the affidavit afterwards with the proper officer.

In C. B.

Same as in B. R. as to notice of justification, &c. only in this court, speak to filaxer to bring down the affidavit to Westminster; pay him 3s. 4d. and court fees; on justification, 3s. 6d.; get the rule for allowance, and serve it on plaintiff's agent.

OBSERVATIONS.

(D 1.) On the Time and Manner of justifying and adding Bail.

(D 2.) On the Notice of Justification.

(D 3.) On opposing Bail, and what are good Grounds of Opposition.

(D 4.) On the Exoneretur, and of striking the Bail out of the Bail-piece.

(D 5.) On the Allowance of Bail.

As to the time in which bail are to justify, see above, D.

When bail must justify.

It was formerly doubted in C. B. whether defendant should not have the first four days of the succeeding term to justify in, when exception was made to bail in vacation; and indeed that time was usually allowed. Bar. 79. 101. 111. 115. But it is now settled, that he must justify as in B. R. on the first day.

If

Of Bail to the Action, or Bail above.

If bail are suffered, by plaintiff's negligence, to justify, though after the expiration of the four days, and are allowed, plaintiff cannot move for an attachment, because he must swear that bail are *not* put in and *perfected*.

Bail cannot justify after the rule upon the sheriff to bring in the body is expired. *Overton's case*, Mic. 26 G. 3.

Where fresh bail are added, it should be done within the time allowed for their justification, and they must actually become bail before the delivery of the notice of justification to plaintiff's attorney. R. M. 18 G. 3. C. B. *Collier v. Godfrey*, C. B. T. R. 291.

When bail must be added.

After an exception to bail put in before a judge, defendant *added* bail, but did not justify in court pursuant to the rule for perfecting bail in *four* days; plaintiff proceeded on the bail-bond without excepting against the bail, and held regular. *Gregory v. Gurdon*, Bar. 74.

When added, bail must justify.

If bail be not present at the sitting of the court, they must wait till it is rising; and then, unless opposed by counsel, their justification is a matter of course, upon the judge's clerk attending with the bail-piece, or filazer with his bail-book.

How if bail be not present at the sitting of the court.

Bail may justify before a judge at his chambers, by consent of plaintiff, or his attorney; but otherwise the justification, if in London or Westminster, or within 10 miles thereof, is in person, in open court, in Serjeant's Inn; but if beyond that distance, by affidavit before a commissioner; as see ante, D.

Where bail are to justify.

And this affidavit should be formal and explicit.

An affidavit of justification, stating that the bail were severally worth the sum wherein they were bound by their recognizance, after all their *just* debts were paid and satisfied, was held insufficient; it not being in common form: the word *just* ought to be omitted. Bar. 67.

Of the affidavit of justification in country causes.

Yet in B. R. it is regular, I believe, to swear bail is worth, &c. after all his *just* debts are paid.

M 4

The

Of Bail to the Action, or Bail above.

The bail, who resided in the country, had entered into a recognizance before a judge in town; and being excepted against, sent up an affidavit of sufficiency, which was allowed, no opposition being made by plaintiff thereto. Bar, 102.

When it should be sent up.

But in a country cause, it is often impossible to justify, &c. within the four days; therefore it is usual to send up an affidavit of justification along with the bail-piece; vid. ante, (A 2.); but if that is not done, application must be made for time to justify.

Summons for further time.

So in other cases, as in adding bail, &c. if the attorney be pressed for time, he may take out summons for further time.

What a defendant in custody must do to get discharged.

If defendant goes to gaol before return of writ for want of bail, he must put in and perfect bail above, before he can get discharged; but, when perfected, he may be discharged on summons.

How if in vacation.

If he happens to be in custody in a vacation, his bail may justify at a judge's chambers, and plaintiff may oppose them there; this being an exception to the general rule, that bail cannot justify at a judge's chambers without consent, as defendant would otherwise, from plaintiff's obstinacy, be incapable of getting discharged until the first day of term. Imp. B. R. 147.

Bail must be justified at the place mentioned in notice.

Defendant gave notice to justify in court, and instead thereof, did so at a judge's chamber, and was then surrendered to the Fleet; held insufficient, and rule to stay proceedings on bail-bond discharged. *Cremer v. Bulman*, Bar. 67.

A defendant was committed to the Fleet for endeavouring to bribe the plaintiff's attorney not to appear against him on justifying bail. *Cas. of Prac. C. B.* 88.

When further time will be allowed for justifying.

Where the bail do not attend, or are not permitted to justify on account of a defect in the notice of bail or justification, the court will, in general, allow them further time to justify. But where they are rejected, on account of some personal insufficiency, the court will seldom

Of Bail to the Action, or Bail above.

seldom allow further time to add and justify others; and if the bail do not justify at the time appointed, and no further time is given, they are out of court. *Tid. 142. Loft. 72. 187. Per Cur. M. 25 G. 3. T. 24 G. 3.*

But the usual way, in case the bail, through the hurry of the business of the court or otherwise, do not justify on the day mentioned in the notice, is, to give another notice that the bail will justify the next morning, and to make another affidavit of service of notice, and to attend with the bail to justify accordingly.

(D 2) *Of the Notice of Justification.*

(D 2.)

In B. R. if plaintiff except to bail, defendant may give notice Monday to justify on Tuesday, provided the same bail mean to justify, as have been already put in; for it is presumed plaintiff has made the proper inquiry in regard to their sufficiency before he excepts. But if new bail are added, then notice on Monday must be for Wednesday.

What time requisite.

In C. B. whether the same bail, or fresh bail, two days notice, *i. e.* Monday for Wednesday, must be given. *Bar. 82. 88.* But Sunday is no day; so that notice on Saturday for Monday would be bad. *Gregory v. Reeves, Bar. 303.*

The notice of justifying bail should particularly express the names of the bail.

What it should contain.

A notice that A., B., & C., or two of them, will justify, is bad. *Loft. 26.*

Notice that three will justify, is irregular. You may as well give notice of threescore, and send plaintiff to inquire all over London. *Allen v. Keyt, Blac. Rep. 1122. C. B. sed aliter per Loft. 252. in B. R.*

In B. R. in Hilary term, 7 G. 3. in a cause, *Smith v. Trinder*, bail were to justify in 4000l.; and court suffered one bail to justify in 4000l. and two other bail in 2000l. each.

If

Of Bail to the Action, or Bail above.

If one bail be added, and one of the original bail justify at the same time with that added, vary the notice according to the fact.

A notice given in the name of one of the plaintiffs only, where there are joint plaintiffs, is bad. *Loft. 237.*

If defendant changes his attorney without leave of the court, and gives notice of justifying bail by his new attorney, it is irregular, and plaintiff is not bound to accept such notice. *Kaye v. De Mottos*, Blac. Rep. 1323. Do. 217.

Bail, though the same as were given to the sheriff, cannot justify without having given notice. *Anon. Barn. 31.*

How it must be served.

Copies of such notices must be served on plaintiff's attorney, by leaving same at his house with some one of his servants; and affidavit must be made by the person who serves notice of justification, which is afterwards annexed to the brief for moving to justify, and read in court.

Bail must become such before notice.

Before any notice of justification is given, bail must actually have become such, otherwise they will not be allowed to justify. *Collier v. Godfrey*, C. B. T. R. 291.

(D 3.)

(D 3.) *Of opposing Bail, and upon what Grounds.*

Of the grounds of opposing bail,

When bail are about to justify, they may be opposed by plaintiff's counsel, the grounds of which opposition are various.

by reason of their profession or avocation.

In some cases bail may be objected to on account of their profession or avocation.

No attorney can justify as bail. *R. M. 14 G. 2.*

Nor an attorney's clerk. *Cowp. 828. S. C. Doug. 450.*

Nor sheriff's officer, bailiff, or other person concerned in the execution of process; nor the keeper of any prison. *Hawkins v. Magnall*, Do. 466.

Nor

Of Bail to the Action, or Bail above,

Nor any of the Marshalsea-court officers; nor any sergeants at mace, nor other persons executing the process of any courts, although he may only be the summoning officer of the sheriff's court to warn juries, &c. *Bolland v. Pritchard*, Blac. 799.

Again, persons outlawed, after judgment, cannot be bail, nor any one convicted of perjury; and he may be even asked, Whether he has not stood in the pillory for perjury. *King v. Edwards*, 4 D. & E. 440.

Persons outlawed, or guilty of perjury.

So a foreigner, if he has not property in England to the amount for which he is bail, is, in B. R. objectionable. *Boddy v. Leyland*, Burr. 2526.

Foreigners.

But in C. B. the circumstance alone of the foreigner not having effects here, is not sufficient to reject him. *Smith v. Scandrett*, Blac. 444. Especially if defendant be a foreigner. *Christie v. Filleul*, Blac. 1323.

So it has been objected, that the bail live in the verge of the court; but this, without other suspicious circumstances, such as his being much in debt, and the like, is not sufficient. *Glead v. Mackay*, Blac. 956.

Living within the verge,

It is a ground of opposition that the bail are not housekeepers, though it is of no consequence how trifling the rent of the house is, or whether it is rated or not. Or that they are deficient as to property in not being worth double the sum sworn to after payment of all their debts. Uncertificated bankrupts, or such as have been twice bankrupts, and not paid 15s. in the pound, are subject to this objection.

Not being housekeepers, or worth double the sum sworn to.

So if any suspicions arise from the conduct of the bail, as their having assumed fictitious, or other people's names (a), for which they are liable to be put in the pil-

If suspicious, or prevaricating in their conduct.

(a) By stat. 21 Jac. 1. c. 26. s. 2. & stat. 4 & 5. W. & M. c. 4. s. 4. "If any person shall acknowledge, or procure to be acknowledged, any recognizance or bail in the name of another person, not privy or consenting to the same; or shall represent or personate another person before a commissioner, whereby he may be liable to the payment of any debt or damages, he shall, on conviction, suffer death without benefit of clergy."—To effect which conviction the bail-piece must be filed. 2 Sid. 90.; and after the offender is convicted, but not till then, proceedings will be set aside against the party personated. Tid. 149.

lory;

Of Bail to the Action, or Bail above.

lory; or their not knowing the defendant, or having frequently been bail before, without being able to say how often, or what sums, or in what actions, and the like.

If the proceedings have been irregular.

The last ground of opposition which I shall mention is, any defect or irregularity in the proceedings, either in the notices themselves, of putting in, or of justifying bail, &c. or in the service thereof. See ante, D 2.; or as to the time of the bail's justifying, for which see ante, D 1.

(D 4.) *(D 4.) Of the Exoneretur, and of striking the Bail out of the Bail-piece.*

When bail are excepted to, and do not justify, but others are added who do, the names of the former bail still continue upon the bail-piece, until a rule of court be made for striking them out.

The use of the exoneretur.

So that in order to get themselves discharged of their recognizance, they must move to be exonerated, and have their names struck out of the bail-piece, for which a rule will accordingly be made. *Fulke v. Bourke*, Blac. 462.

When bail may be struck out of bail-piece,

If one person be excepted to as bail, and another be added, the name of the former may, with leave of the court, be struck out of the bail-piece at any time before scire facias; and even after scire facias brought, proceedings as to him will be stayed. *Waller v. Green*, Say. 309.

Bail excepted to, but not struck out of the bail-piece, may, if afterwards proceeded against, move to enter an *exoneretur nunc pro tunc*, which will be granted. *Humphry v. Leite*, Bur. 2107. B. R.

Bail in error, who refuses to justify, may have his name struck out of the bail-piece at any time. 1 Wil. 337. B. R. *Jones v. Tub*, S. C. Say. 58.

When bail have once justified, if plaintiff should not like them, he must not discontinue by a side-bar rule, without disclosing the fact, and bring a new action; as, in

Of Bail to the Action, or Bail above.

in such case, the court will discharge the side-bar rule : but he ought to ask leave of the court to charge the defendant in custody, disclosing the whole of the case to them. *Belchier v. Gansell*, Burr. 2502.

One who is bail cannot be a witness in the cause for his principal ; therefore if defendant shall have occasion to examine one of his bail as a witness, he must make an affidavit that such bail is a material witness for him in the cause, and thereupon move the court, that he may be struck out of the bail-piece, on adding and justifying another in his stead ; but it will not be granted without an affidavit that he is a material witness. *Young v. Wood*, Bar. 69.

Of striking the bail out to make him a witness.

(D 5.) *Of the Allowance of the Bail.*

(D 5.)

It has been already observed, that after justification of bail, a rule for their allowance must be got of clerk of rules, with a copy of which plaintiff's attorney must be served, and the rule itself, at the same time, must be shewn to him.

How got.

The form of the rule is as follows :

Wednesday next, after ——— day of ——— in the 22d year Form thereof.
of the reign of King George the Third.

A. B. } Upon reading the affidavit of J. S. it is ordered, that
C. D. } the bail put in for the defendant, who have this day
justified themselves in court, be allowed, and the bail-piece filed on
the motion of ——— .
By the Court.

Until this rule of allowance has been properly obtained, and served upon the plaintiff's attorney, bail is not perfected ; but an attachment may be sued out against the sheriff for not bringing in the body, nor will the court on motion set aside such attachment ; and this, although the plaintiff was present, and opposed the bail at the time of justification. *The King v. Sheriff of Middlesex*, 4 D. & E. 494.

The necessity of this rule.

This rule of allowance having been served, every thing has then been done, on the part of the bail, which is required by the practice of the court, and the bail are therefore then said to be perfected.

SECTION VI.

Of the Surrender in Discharge of Bail.

Having shewn in what manner bail is to be put in, and perfected, and also how such bail, by their recognizance, become answerable, either that the defendant shall pay the debt and costs that may be adjudged against him, or surrender himself to prison, or that they (the bail) will do so for him; it may not here be improper, briefly to consider the practice with respect to the surrendering of the principal in discharge of the bail, inasmuch as it may be made at any stage of the suit; and in certain cases it may be adviseable for the bail to take this step, without delay, in order to get themselves discharged.

The surrender may be made either voluntarily, by the principal himself; or compulsory, by the bail seizing the principal, and surrendering him; and either in court, if sitting, or before a judge at his chambers—the last of which is most usual; and the mode of making such surrender is as follows:

When defendant is at large,

In B. R.

In C. B.

How to surrender defendant in discharge of his bail.

Take defendant to a judge's chambers, and the judge's clerk will make out the committitur and surrender, and deliver him to the custody of the tipstaff, to be conveyed to the King's Bench prison; pay clerk 9s. 6d.; tipstaff 10s. 6d.

Get the filazer to attend at a judge's chambers with his book; bail are rendered therein, and the judge at the same time exonerates the bail, and delivers defendant to tipstaff to be taken to the Fleet; pay filazer 7s. 4d. tipstaff 10s. 6d. judge's clerk 13s.

Notice of the render must be immediately given in writing to plaintiff's attorney, and an affidavit must be made before a judge of the service of the notice; carry affidavit to the judge's clerk or officer, who hath the custody of the bail-piece; who will take the same, and keep it as his voucher, and deliver you the bail-piece to be filed. The marshal (or gaoler) will

Then give notice of such render to plaintiff's attorney; but as nothing further is to be done for the discharge of the bail, there is no need of any affidavit of the service.

N. B. The above is the mode when the proceedings are by original.

But if the action be by bill, or attachment of privilege, then bail-

Of the Surrender in Discharge of Bail.

will also give you a certificate of the surrender (that defendant is in his custody), which the tipstaff generally brings with him, and gives to you at the time the render is made; pay for same 3s. 6d.; carry the bail-piece and certificate to the master, who will enter an exoneretur upon the former; pay him 2s. 4d.; leave the certificate with him to be filed; carry bail-piece to the signer of the writs, Mr. Webb, to be filed; pay him 4d.; this done, you enter the committitur and surrender in the marshal's book at the clerk of the judgments office, for which you pay 4d. and then render is complete.

Under the commitment must be added, the state of the cause at the time of surrender, viz. If before declaration, the sum sworn to on arrest; if declaration filed or delivered, to the sum sworn to, must be added—"Declaration filed or delivered;" if issue joined, or interlocutory judgment signed, as the case may be, after final judgment in debt, the debt and damages; and in other cases, quantum of damages. R. Caf. 8 G. 3.

When defendant is in custody:

If defendant be in custody of any sheriff at the suit of another plaintiff, or otherwise, the bail may have a habeas corpus either in term or vacation, directed to the sheriff or gaoler in whose custody he is, to bring him before a judge, returnable immediately, in order to render him in discharge of his bail. Bur. 1876.

Make out the habeas, as in other cases, vide Hab. vol. 24.; lodge it with gaoler in whose custody defendant is; he will bring him into court, or to a judge's chambers, in order that he may render himself, or that his bail may do it; and the same steps must be taken by the bail to complete render, as where defendant is at large; only habeas, and return thereof, is left with judge, and return of habeas marked, or surrender signed by him, which is carried

bail-piece must be carried to the judge's chambers, by Mr. Sherwood, clerk of the dockets, &c. and exoneretur entered thereon; pay him 7s. 4d. tipstaff 10s. 6d. judge's clerk 16s.

Give notice as above, but no affidavit necessary. Imp. C. B. 504.

N. B. The above is the shortest way; but in the older books of practice, the same steps are directed to be taken in this court as in B. R. mutatis mutandis, with respect to the different prisons and officers of the respective courts.

Of the Surrender in Discharge of Bail.

carried over to gaoler into whose custody defendant is rendered; attorney must get a tipstaff to carry him over to warden or gaoler. Tipstaff 10s. 6d.

OBSERVATIONS:

From the multiplicity of cases which may be found in the books on the doctrine of surrender in discharge of bail, this point of practice at first appears obscure, and difficult to be understood: it may, perhaps, not a little tend to the elucidating of the subject, if it be treated under two distinct heads. First, the surrender of the defendant *before* judgment be obtained against him; and next, the surrender of the principal *after* judgment has been obtained against him.

For, although no proceedings can be had against the bail until *after* final judgment against the principal, yet they may surrender him, or he may surrender himself at any stage of the cause, subject to the observance of certain rules and restrictions.

To the most general and useful of the rules and restrictions which ought to be observed in the making of the surrender, at any time *after* the commencement of the original suit, and *before* judgment therein, we shall at present confine ourselves; reserving the consideration of the surrender *after* judgment to a future part of the work, when we shall treat of the proceedings against bail, either by action upon their recognizance, or by *scire facias*.

The manner in which such surrender is to be made has been shewn above; it now remains only to make a few remarks upon

(A) The Time when such Surrender may be made; and what is requisite to be done before the making thereof.

(B) The Power of the Bail to take their Principal to surrender him.

(C) The necessary Steps to be taken after the Surrender; and herein of the Exoneretur, &c.

(D) Certain Circumstances which discharge the Bail without any Render.

(A) The

Of the Surrender in Discharge of Bail.

2. The Time of making such Surrender, and what is necessary to be done before the making thereof. 3.

No surrender can be made *before the return of the writ*, because *non est inventus* may be returned, and then the bail goes for nothing; and if a *capi* be returned, defendant, at the return, is supposed to be in custody of the court; and then, if bailed, to be delivered to his bail; and there cannot be a surrender till after that time.

Of the time of making the surrender.

Not before return of writ.

Nor *before bail above be put in*; for the condition of the bail-bond to the sheriff is, that defendant shall appear upon the return of the writ, which appearance is effected by putting in bail above, or to the action. When once defendant, therefore, is admitted to bail, and bail-bond entered into, "nothing can be a performance of the bail-bond but putting in bail above." Bur. 2683. *Harrison v. Davies*.

Nor before bail above be put in.

So that the defendant cannot even surrender himself in order to discharge the bail below, after the bail-bond has been once entered into; for should he do so without putting in bail above, plaintiff may proceed upon the bail-bond. *Ib.*

And *complete* bail above must be put in, in order to warrant a surrender; so that two persons at least must become bail, for the putting in *one* bail is as no bail; and if a surrender be made thereon, plaintiff may proceed on bail-bond. Bar. 46. 172. P. R. 84. Cro. El. 672.

Which must be complete bail above.

But bail above may be put in without defendant's consent, and may the next day take up defendant, and surrender him in discharge of themselves. *Berchere and another v. Colson*, Str. 876.

But it may be put in without defendant's consent.

So in B. R. the bail below may enter themselves bail above, if defendant refuse to appear himself, or to suffer any body to appear for him. *Golbeir v. Colson*, 1 Barn. 369.

N

But

Of the Surrender in Discharge of Bail.

But this should be done by motion; and unless bail-piece be signed by a judge, court will not allow such bail to justify themselves. *Ib.*

How if bail-bond be assigned.

If, from any neglect of defendant, the bail-bond be assigned, no surrender can be made until bail above be put in and perfected; the court must then be moved, or a summons taken out before a judge, to set assignment of bail-bond aside, on payment of costs, which must be done before the principal is rendered.

And if plaintiff has lost a trial in the original action, the bond cannot be set aside, nor can bail render.

But if, instead of proceeding on the bail-bond, plaintiff rules the sheriff, the bail may render principal, though plaintiff has lost a trial. *Steward v. Bishop*, Bar. 60.

When bail above is put in, how surrender may be made.

When bail above are put in, if they be accepted, they may, in both courts, without any other previous step, surrender the defendant at any time before judgment, and even for some time after; but at present we do not treat of the time allowed for surrendering *after* judgment. So if they be excepted to, and nothing further done, *i. e.* no rule served on the sheriff, they may, in both courts, surrender without justifying; though there are old cases to the contrary. 12 Mod. 526. 3 Wil. 59.

How if bail be excepted to.

How if excepted to, and sheriff ruled in B. R.

But if they be excepted to, and the sheriff be also ruled to bring in the body, then, in B. R. they must justify before they can surrender defendant. So if the sheriff be ruled, bail must, in B. R. not only be put in, but justify before they can render.

In C. B. otherwise.

In the court of Common Pleas, however, no such justification, even in these last cases, is necessary; it being there held, that though the sheriff has been ruled, yet any bail are sufficient for the purpose of rendering the defendant, without justifying. *Hall v. Walker*, 1 C. B. T. R. 638.

In this, therefore, the courts differ in their practice; which difference did not exist till lately. The practice, indeed,

Of the Surrender in Discharge of Bail.

indeed, of the court of Common Pleas has in this respect been very changeable and unsettled.

No longer ago than in the 10 Geo. 3. it was laid down as a rule by the court of C. B. that if bail above, when put in, were excepted to, they could not surrender without justifying. 3 Wil. 59. In the next year, the contrary was settled and agreed upon by the judges, assisted by the secondaries, to be the practice, viz. that although such bail were excepted to, yet they might surrender without justifying; which has been from thenceforth adhered to. Blac. 758. *Mitchell and Morris*, 1179. *Jackson and Morris*, and *Jackson and Trinder*, 1180. Such is the practice also in B. R. Again, in the year 1784, it was settled by the judges, that when a rule to bring in the body has been served, bail must not only be put in, but justify, though the defendant should be immediately rendered. Imp. 164. Which is agreeable to the practice of K. B. as above-mentioned, making the distinction between a bare exception to the bail, and an exception accompanied with the ruling of the sheriff.

The practice of which court has been very changeable in this respect.

But in the case of *Hall and Walker*, 1 C. B. T. R. 638. the court of Common Pleas said there was no good reason for the distinction, and that it was not necessary, in either case, for the bail to justify in order to surrender.

If, however, bail be *surreptitiously* put in, though they may justify, and afterwards render the defendant, yet such render shall be nugatory, because they shall be deemed as no bail, and therefore cannot surrender. *Jackson v. Morris*, 2 Blac. Rep. 1179.

How if bail be put in surreptitiously.

So although bail excepted to may render without justifying, yet if they attempt to justify, and are rejected, they then cannot render, because they are deemed as no bail.

Or if they attempt to justify and are rejected.

B. Of the Power of the Bail to take their Principal to surrender him.

15.

If defendant secretes himself to avoid being rendered by his bail, they, or either of them, may take him where-
N 2

If defendant secretes himself, what bail may do.

Of the Surrender in Discharge of Bail.

When taken by
them, how to
proceed.

ever they meet with him, even in his own house, so that they break no locks. When taken, one of the bail must always remain with him, (for they cannot depute their right of custody to another, without defendant's consent in writing,) till he is rendered. If he consents to go to an officer's house till rendered, bail must take such consent from him in writing. But so soon as they have delivered him upon the render into the custody of the tipstaff, he is answerable for his escape.

At what time
and place they
may take him.

Bail cannot take defendant on a *Sunday* in order to surrender. *Brooks v. Warren*, 2 Blac. 1273.

But 6 Mod. 231. *contra*. Bail may take principal on a *Sunday*, and confine him till next day, and then render him.

Bail may seize a bankrupt while under examination, or going to a court of justice.

So they may have a *habeas corpus* to bring up a king's debtor, or any one in custody of any sheriff or any gaoler, or a person convicted of felony, to render him in their discharge. Str. 1217.

Although such prisoner be sentenced for transportation. *Ib*.

In which case the *habeas corpus* should be on the crown side. But if the convict be actually on board a ship for transportation, court will not grant such *habeas corpus*. *Fowler v. Dunni*, Burr. 2034.

So an impressed man in custody of the Savoy, may be taken and rendered; who shall first be delivered over to the marshal, with orders to be delivered *instantly* to the keeper of the Savoy. *Bond v. Isaac*, Bur. 339.

C.

C. Of the necessary Steps to be taken after the Surrender; and herein of the Exoneretur, &c.

Notice of the
render must be
given.

No surrender is good until notice in writing given to plaintiff's attorney. R. Trin. 1 Ann.

No

Of the Surrender in Discharge of Bail.

No surrender is complete until the fees are paid ; and even if the judge's signature of the entry of commitment be on bail-piece, if fees were not paid, it will be ordered, on motion, to be struck out. *Huxley v. Clendon*, Com. 554. Bar. 70.

Fees must be paid.

When the surrender has been made, the bail-piece shall be marked and discharged, otherwise the plaintiff may proceed against the bail. Comb. 263.

An *exoneretur* must be marked on bail-piece,

If bail-piece be filed without being discharged by master, bail remain liable, though defendant be in actual prison. Mod. Caf. 340.

or bail will be liable.

This discharge is made by the master entering an *exoneretur* thereon, after which it is filed by the proper officer.

How *exoneretur* entered.

A. sued B. in three actions, and he put in three bails ; plaintiff recovered in all ; defendant rendered himself, and one of the bails entered an *exoneretur* on the bail-piece, which the rest did not. And *per Cur.* the rendering is a discharge *in posse* to all, but not complete and actual as to all till *exoneretur* entered on all. *Williams v. Williams*, Sal. 98.

A bail excepted to, who does not justify, may at any time move to have his name struck out of the bail-piece ; for as he was excepted against, he might reasonably conclude that he was no longer to be considered as bail. *Jones v. Tub*, 1 Wil. 337.

When it may be moved for.

Upon rule to shew cause why an *exoneretur* should not be entered upon the bail-piece, it appeared that the bail had rendered the defendant regularly, and had given notice of the render to plaintiff's attorney ; that defendant had been since in custody, and that defendant's attorney had omitted to enter an *exoneretur* upon bail-piece. Rule made absolute upon paying the costs which had accrued since the render. *Weaver v. Chandler*, Say. 7.

If omitted to be done at the proper time.

Where no *exoneretur* is entered on the bail-piece, and plaintiff proceeds to judgment against bail, if it appears that

Of the Surrender in Discharge of Bail.

that defendant has done every thing proper on his part, and that it was owing to plaintiff's attorney that the bail-piece was not properly discharged, by his taking the same away, judgment will be set aside, and *reddidit se* ordered to be entered on bail-piece, and the same to be filed, *Knight v. Winter*, Bar. 68.

Of the *reddidit se*,

The *reddidit se* on the bail-piece is only an escrol or warrant to the officer, (viz. the signer of the writs in K. B. and filazer in C. B.) to enter the surrender on record. Where the entry on bail-piece, therefore, was obtained by fraud, and no surrender on record, the court held the surrender ineffectual, and ordered the *reddidit se* to be struck out. Bar. 70.

How to get *exoneretur* if bail-piece lost.

The bail-piece was lost, on which the bail moved that a new bail-piece might be filed, in order that he might surrender the principal (who had been actually in custody of the bail for some days), which he could not do for want of a bail-piece; and though the plaintiff refused to consent, yet the court gave leave to put in bail *de novo*, on hearing the whole matter; which was done, and then the bail surrendered. Bar. 108.

Of the commitment, and the use thereof,

Although the bail be discharged by the entry of the *reddidit se* in the judge's books, and the *exoneretur* on the bail-piece, yet the marshal is not duly charged with the custody of the defendant until the entry of the *commititur* and surrender be made in the marshal's books. So that until that be done, he will not be liable to an action should defendant escape. *Watson v. Sutton*, Salk. 273.

Under every commitment should be entered the state of the cause at the time of the render, as before-mentioned at the beginning of this section.

How if defendant is a bankrupt.

It was formerly necessary, if defendant became a bankrupt and had obtained his certificate, for the bail to surrender him, and for application to be made to the court for his discharge upon an affidavit of the facts; but it is now usual in such case to move the court in the first instance, without any render for leave to enter an *exoneretur* on the bail-piece. Bar. 104. Cow. 824,

D. Of

Of the Surrender in Discharge of Bail.

D. Of Circumstances which discharge the Bail without any Render. D.

There are also other circumstances which entitle the bail to a discharge, and are proper grounds, supported by affidavit, for moving the court for leave to enter an *exoneretur*.

Such as defendant, pending the suit, being made a peer; *Trinder v. Shirley*, Do. 45.; or becoming a member of the house of commons; *Langridge v. Flood*, H. 26 Geo. 3. Tid. 152. The reason of which is, because it is out of the bail's power to surrender defendant.

If defendant be made a peer, or the like.

So if plaintiff declare for a different cause of action than what is mentioned in process, or in a different county, provided the proceedings be by special original, bail will be discharged.

Or declaration is not according to the process.

WE HAVE HITHERTO SUPPOSED THAT THE DEFENDANT, AGREEABLE TO THE CONDITION OF THE BAIL-BOND, APPEARS AT THE RETURN OF THE WRIT, BY PUTTING IN SPECIAL BAIL, CALLED BAIL TO THE ACTION, OR BAIL ABOVE, AND HAVE SHEWN HOW TO EXCEPT AGAINST, JUSTIFY, ADD TO, OPPOSE, AND PERFECT SUCH BAIL, AND ALSO HOW TO SURRENDER DEFENDANT IN DISCHARGE OF THE BAIL; BUT IN CASE THE DEFENDANT SHOULD FAIL IN THIS HIS APPEARANCE, AND NEGLECT TO PUT IN BAIL, OR TO JUSTIFY THEM IF EXCEPTED TO, IN DUE TIME; PLAINTIFF HAS TWO REMEDIES AT HIS ELECTION; THE ONE, BY GETTING THE BAIL-BOND ASSIGNED TO HIM, AND PROSECUTING THE SURETIES MENTIONED THEREIN; THE OTHER, BY PROCEEDING AGAINST THE SHERIFF, TO COMPEL HIM EITHER TO PUT IN GOOD BAIL, OR HIMSELF TO SATISFY PLAINTIFF'S DEMAND.

SECTION VII.

Of the Assignment of the Bail-bond, and the Proceedings thereon.

At common law, the only regular mode of redress which a plaintiff had, when the defendant neglected to

Remedy at common law if defendant did not appear.

Of the Assignment of the Bail-bond,

put in or to perfect bail above, was to proceed against the sheriff, and cause him to be amerced.

The sheriff might indeed have given up the bail-bond, and suffered plaintiff to prosecute the bail; but this was merely optional on his part; and even if he did so, the action could only have been brought in the name of the sheriff, who might at any time have released it, and harassed the plaintiff by compelling him to resort to a court of equity. To remedy this inconvenience, the statute of 4 & 5 Ann. c. 16. was passed, for the express purpose of amending the law, and by the 20th sect. thereof, "the sheriff is bound, at the request and cost of the plaintiff, or his attorney, *to assign him the bail-bond* by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses, without stamp, provided it be stamped before action is brought thereon; and if the security be forfeited, the plaintiff, after assignment, may *bring an action thereupon in his own name*, and the court may, by rule, *give such relief* to the plaintiff and defendant in the original action, and to the bail upon the security, as is agreeable to *justice and reason*; and such rule of court shall have the nature and effect of a discharge to such bail-bond."

How enlarged by
statute.

The above statute, by which the assignment of the bail-bond, and the proceedings thereon, are authorised and regulated, presents three things for our consideration: namely, the assignment of the bond; the action thereon; and the equitable interference of the court in giving relief therein.

(A) Of the Manner, Time, &c. of assigning the Bail-bond.

(B) Of the Action thereon.

(C) Of staying Proceedings therein.

2. A. The Time, Manner, &c. of assigning the Bail-bond.

How to procure
assignment.

If bail above be not duly put in, or if put in, and excepted to, they do not justify in the time limited by the

and the Proceedings thereon.

the rules of the court, and the plaintiff would obtain the bail-bond from the sheriff, his attorney should apply in the following manner :

If in Middlesex, to the under sheriff at his office in Tooke's court, Cusfitor street; or if in London, to the secondary of the comptroller where the bail-bond was taken; or if in the country, to the under sheriff; either of whom is bound to indorse an assignment thereon, and deliver it to the plaintiff or his attorney, if applied to. In London or Middlesex pay 5s. in the country, 6s. 8d.

The manner in which the assignment is to be made, is shewn by the statute :—" The sheriff, or other officer, " at the request and costs of the plaintiff in such action " or suit, or his lawful attorney, shall assign to the plaintiff in such action, the bail-bond or other security taken " from such bail, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses, which may be done without any stamp, " provided the assignment so indorsed be duly stamped, " before any action is brought."

Of the manner of making assignment.

The statute does not mention any particular time in which it is to be assigned. It is not necessary therefore to stay until the bail-bond be forfeited, before such assignment is made; although no action can be brought thereon till it be forfeited.

Of the time of making assignment.

It is advisable, however, for the plaintiff not to take an assignment of the bond, unless he is well convinced of the responsibility of the sureties mentioned therein. For it is at his election either to have the bond assigned, or to proceed against the sheriff; but when he has made such election, by taking an assignment, he discharges the sheriff, and cannot afterwards resort to him; for the court will not, in such case, grant him a rule upon the sheriff to return the writ. *Lord Brooke v. Stone*, 1 Wil. 223. Sal. 99.

Of the effects of such assignment, and the caution necessary in taking it.

Besides which (in B. R.) if the bail below should become bail above, he cannot, after taking such assignment, except to them. Sal. 97.

The taking of the assignment of the bail-bond is a mere voluntary act of the plaintiff; for though the sheriff

Plaintiff not compelled to take it.

Of the Assignment of the Bail-bond,

riff should tender it to him, he cannot be compelled to accept of it. *Rex v. Dawes*, Ld. Ray. 722.

Whom must make it.

Either the high-sheriff, or the under-sheriff in the name of the sheriff, must assign the bail-bond, or it will be bad. Even an under-sheriff's clerk cannot assign it. *Kitson v. Fagg*, Str. 60.

Where it may be made.

There is no necessity for the bail-bond to be assigned by the sheriff in his own county; it may be assigned any where. *Gregson v. Heather*, Str. 727. Ld. Ray. 1455. Fort. 366.

When plaintiff loses benefit of assignment in C. B.

In the case of *Sparrow and Naylor*, in the court of Common Pleas, Blac. 876. it was determined, that where the plaintiff has not declared before the effoin day of the third term inclusive, after the return of his writ, he has deserted his cause, and is out of court, and cannot afterwards take an assignment of the bail-bond; because, by the sound construction of the statute 3 Ann. the suit must be depending when the bail-bond is assigned, and it was plaintiff's own fault in not declaring *de bene esse*.

But not in B. R.

But in B. R. the practice is otherwise; and although plaintiff does not declare within two terms after the return of the writ, (the time allowed by that court,) yet he may afterwards take an assignment of the bail-bond; and the reason is, because plaintiff is not *obliged* to declare *de bene esse*; and if he does not, and defendant neglects to put in bail, he cannot declare at all, since he cannot declare *in chief* until defendant has appeared by putting in bail. The defendant, therefore, being in fault, ought not to take advantage of his wrong. *Merryman v. Carpenter*, Str. 1262.

What shall not be a waiver of assignment.

Where the defendant is guilty of a neglect in not putting in bail in time, whereby the bail-bond becomes forfeited, the plaintiff may except to bail put in, in order to stay proceedings on the bail-bond, and it will not be a waiver of the assignment. Cowp. 769.

and the Proceedings thereon.

15. Of the Action on the Bail-bond.

15.

The next thing which the above-mentioned statute of Ann authorises is, the *action on the bail-bond*, to be brought by the plaintiff in his own name, as assignee of the sheriff, which remedy did not exist at common law.

This action is given by the stat. of Ann.

"If the bail-bond, or assignment, or other security taken for bail, be forfeited, the plaintiff in such action, after such assignment made, may bring an action and suit thereupon in his own name."

It is to be observed, however, that before the bringing of such action, the statute directs, that the assignment so indorsed, as before directed, shall be duly *stamped*.

How to proceed in such action.

This stamp is a double sixpenny stamp, which is put just over the top of the assignment, and the clerk at the stamp-office writes, in red ink, the day of the month and year when the same was stamped.

The assignment being thus completed, sue out process in the usual way; serve the bail with copy thereof, and afterwards declare against them, and proceed as in common actions, not bailable.

If the arrest were in London or Middlesex, the bail-bond cannot be put in suit till *four days exclusive after the return of the writ* in B. R. R. M. 8 Ann, and *four days from the appearance day of the return of the writ* in C. B. R. 9 Ann. *Bellis v. Mitford*, Blac. Rep. 1009.

At what time it may be brought if the arrest in London.

If the arrest were in any other city or county, bail-bond cannot be put in suit till *six days exclusive after the return of the writ* in B. R., and not till *eight days exclusive of the appearance day of the return of the process* in C. B., and all proceedings to the contrary thereof, shall be set aside, with costs. Hil. 9 Ann. P. Reg. 69.

If the arrest was in the country,

So that if the writ be returnable on the *sixth* in London or Middlesex, the bail-bond cannot be put in suit till the *eleventh*; if in the country, not till the *fifteenth*; for the fourth and eighth day must completely expire, and if Sunday be the last day, it is not reckoned.

A latitat

Of the Assignment of the Bail-bond,

Sunday not
reckoned if the
last day.

A latitat was returnable on Wednesday, and upon debate, it was held, that the bail-bond could not be assigned until after Monday. For the four days are to be one inclusive, and the other exclusive; and where the fourth day is Sunday, the party has all the next day to put in bail. *Bullock v. Lincoln*, 2 Str. 914. Ib. 782.

In what court
such action must
be brought.

An action on a bail-bond must be brought in the court where the bail was given. *Walton v. Bent*, 3 Bur. 1923. 3 Wil. 348. 2 Blac. Rep. 838. *Morris v. Rees*.

So if the bail-bond be given in a court of a county palatine, in an action brought there, and an assignment thereof is made by the sheriff, the action on the bail-bond must be brought in that court. *Chesterton v. Middleburgh*, Bur. 642.

The action must be brought in the same court, even though the bail be an attorney of another court. For, *per cur.* by entering into a bail-bond the defendant has waived his privilege, whether sued jointly or severally. Bar. 117.

So that if the process on which the bail-bond was given, was issued out of the Common Pleas, the action on the bail-bond must be brought there, and not in the King's Bench. Bur. 1923. and *vice versa*, Blac. Rep. 838.

The reason
thereof.

If brought otherwise, proceedings will be stayed, though after plea pleaded. The reason of the above practice is founded on the construction of the 4 Ann. c. 16. Because the court wherein such action is brought, is empowered to give a general relief to the plaintiff and defendant in the original action, upon equitable terms, which no court can properly do, as they cannot judge of the merits, except that in which the original action is brought, and before which the action on the bail-bond is depending. Blac. 839. 3 Wil. 348.

Exception to the
above rule.

But this rule only holds where the action is brought by the plaintiff as assignee of the sheriff, and which is grounded on the 4 Ann. c. 6. s. 20. ; for it does not extend to actions brought by the *sheriff himself* on such bond,

and the Proceedings thereon.

bond, as such actions may be brought in a different court than that where the original action was. C. B. T. R. 631.

But the *venue* in an action upon the bail-bond by plaintiff, as assignee of the sheriff, may be laid in any county, since the assignment may be made any where by the sheriff. *Gregson v. Heather*, Str. 727. Ld. Ray. 1455.

In what county the venue may be laid.

In an action on a bail-bond, the defendants are not to be held to special bail, for that might occasion bail *ad infinitum*; but you must proceed therein by service of process, as in other actions not bailable; for which see ante, chap. 3.

It is not a bailable action.

The manner in which the bail-bond was assigned, ought to be set out in the declaration, to shew that it was done pursuant to the statute; but, although not accurately stated, the omission will be aided by judgment by default. *Mifflin v. Morgan*, Ld. Ray. 1564.

Of the declaration in such action.

Bail-bond may be sued by the executors of the assignee. *Nott v. Stevens*, P. Reg. 68.

Executors of assignee may sue.

In an action on a bail-bond the arrest is not traversable, therefore none need be shewn; otherwise it would be a way to avoid all bail-bonds civilly taken, without exposing the party by an arrest. *Watkins v. Parry*, Str. 444. *Halley v. Fitzgerald*, Str. 643.

Arrest not traversable.

But the issuing of the process is traversable; so that plaintiff may plead, that no such bill of Middlesex, &c. issued; because, if no such writ issued, the bail-bond is, *ipso facto*, void, and consequently the plaintiff has no ground of action. *Saxby v. Kirkus*, Say. 116.

But the issuing of the process is.

We have already, in part, treated of the extent of the liability of bail, ante, p. 155., and cited the case of *Jackson and Hassell*, Do. 330.; but what was there said, must be considered only as relating to the liability of bail *above* when proceeded against upon their *recognizance*, and not to the sheriff's bail, or bail *below* in actions against them upon the *bail-bond*; for although the *former* may be only liable to the extent of the *sum sworn to and costs*,

How far sheriff's bail are liable by the bail-bond.

Of the Assignment of the Bail-bond,

costs, yet the *latter* are held responsible for the *whole* of the *debt and costs*, if they do not exceed the *penalty* of the bond; and this in both courts.

Thus in B. R. in *Orton and another v. Vincent*, Cow. 71. the case of *Savage and West* is cited; in which, cause being shewn why, upon payment of eleven guineas (the sum sworn to), and costs, all proceedings on the bail-bond should not be stayed; the court discharged the rule, and held, that the plaintiff in the action was entitled to recover not only the sum sworn to, with costs, but the whole debt due; and it was in the principal case laid down as the settled practice, that where the plaintiff might have had judgment against the original defendant, the bail below are liable for the whole debt and costs.

And in the court of C. B. it has been lately settled to be the practice there, that the bail below are liable to the whole debt and costs, to the full amount of the penalty in the bail-bond. *Mitchell v. Gibbons*, 1 C. B. T. R. 76.

C. *Of staying and setting aside Proceedings on the Bail-bond.*

This part of the practice authorised by 4 & 5 Ann.

It has been before observed, that the statute 4 & 5 Ann. authorises three things; 1st, The assignment of the bail-bond; 2d, The action thereon; and 3d, The equitable interference of the court to give relief to the parties. Of the two first we have already treated; it only remains to make a few observations upon the last.

which gives the court an equitable jurisdiction.

This equitable jurisdiction is given by the statute in the following words: "And the court where the action is brought may, by rule or rules of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail upon the said bond, or other security taken from such bail, as is agreeable to justice or reason; and that such rule or rules of the said court shall have the nature and effect of a defence to such bail-bond or other security for bail."

The nature of the relief afforded is to stay

The nature of this relief depends upon the circumstances of the case. If the assignment of the bail-bond has

and the Proceedings thereon.

has been *regularly* made, the relief granted by the court is to *stay* the proceedings; but if the assignment of the bond has been *irregular*, the relief then is to *set aside* the proceedings.

the proceedings, or to set them aside.

We shall therefore briefly consider

- (C 1.) *In what Cases, and upon what Terms, Proceedings on the Bail-bond will be stayed.*
- (C 2.) *In what Cases the Proceedings will be set aside.*
- (C 3.) *In what Manner the Proceedings are to be stayed, or set aside.*

(C 1.) *In what Cases, and upon what Terms, the Proceedings will be stayed.*

(C 1.)

In order that the plaintiff may not be delayed or defeated in the prosecution of his suit, the additional remedy of proceeding on the bail-bond is given him by the statute 4 & 5 Ann. in case the defendant does not appear (that is to say, put in and perfect bail above) in due time; for if he does, the condition of the bail-bond to the sheriff is then fulfilled, and the bail below are, *ipso facto*, discharged.

The intent of the statute, and the principle upon which the courts proceed in staying proceedings.

The chief object therefore is, to enforce the defendant's appearance.

But although the defendant may have neglected to appear within the time allowed, and by reason thereof the plaintiff may have *regularly* brought his action on the assignment of the bail-bond, yet if the defendant should be afterwards willing to put in and perfect bail in order to go on with the original action, and to try the merits, and if the plaintiff be in no respect prejudiced thereby, it would surely be contrary both to reason and justice were the defendant to be excluded from so doing.

It was therefore, upon the principle of doing justice to all parties, that the statute authorised this equitable interference of the courts of which we are now treating.

To enumerate the particular cases in which this relief is granted, would be endless.

It

Of the Assignment of the Bail-bond,

In what cases
proceedings are
staid,

It may be taken as a general rule, that proceedings on the bail-bond (notwithstanding they may be *regular*) will be staid in all cases *where the plaintiff can be put in as good a condition as he would have been in provided the defendant had been guilty of no laches.*

The inconveniences resulting to the plaintiff from the defendant's negligence in not perfecting bail are, the delay occasioned thereby in the original action, and the expence attending the assignment of the bail-bond and the proceedings thereon.

and upon what
terms.

To remedy these inconveniences, certain terms are imposed upon the defendant, to which he must accede, as the conditions upon which the proceedings on the bail-bond are to be staid.

Which terms usually are, that the defendant shall *perfect bail in the original action, receive a declaration, plead issuably, take short notice of trial, and pay the costs to be taxed by the master incurred by the bail-bond being assigned and by the proceedings thereon.*

Thus the plaintiff is reimbursed his expences, and gets to trial in the original action in as short a time as he otherwise would have done.

How, if plaintiff
has lost a term,
and been delayed
going to trial.

But it sometimes happens that the defendant is guilty of a double neglect; first, in not putting in and perfecting bail in time, and thereby suffering the bail-bond to be proceeded upon; and then in not applying with all due diligence to get the proceedings on the bail-bond staid. So that by reason of this delay, the plaintiff may have actually *lost a term*, or have been *hindered* from going to trial so early as he might have done, and therefore cannot now be put in a condition altogether so good as he would have been in, provided the defendant had been guilty of no laches.

Bail-bond then
stands as a secu-
rity.

Still, however, the court will exercise their equitable jurisdiction in granting relief to the defendant; but in order to do the plaintiff as ample justice as possible, and to make him a kind of compensation for the loss of time, and

Of the Assignment of the Bail-bond.

and the consequent delay in the original suit, they add, in such cases, a further condition to the terms above-mentioned, namely, *that the bail-bond shall stand as a security for plaintiff's debt and costs if he recovers in the original action.*

In the court of Common Pleas indeed the plaintiff has judgment on the bail-bond to stand as a security, and execution only is stayed thereon; Bar. 85. But the court of King's Bench does not go the length of giving the plaintiff judgment, but only of permitting the bail-bond itself to stand as the security, and for the proceedings thereon to be stayed. Imp. 150.

In C. B. judgment is granted on bail-bond; but not so in B. R.

In either case, the advantage to the plaintiff is obvious, as he thereby gains a double security; and this is always given him when, by defendant's negligence, a term, or the opportunity of trial, is lost, and the plaintiff cannot be put in as good a condition as if he had not been delayed.

It used formerly to be held, that it was incumbent on the plaintiff to quicken the defendant, and to do every thing in his power to forward the proceedings, otherwise the bail-bond would not be allowed to stand as his security.

How far plaintiff must quicken defendant.

Thus it has been refused, because the plaintiff had not declared *de bene esse*, which he might have done, and had therefore himself not used his utmost diligence. *Ward v. Alderton*, P. R. 71.

But it has been since determined, that plaintiff is not bound to declare *de bene esse*, and therefore his not doing so shall not be imputed to him as a laches to deprive him of the benefit of the bail-bond as a security. *Merryman v. Carpenter*, Str. 1262.

He is not bound to declare *de bene esse*.

If, however, the delay which he complains of, has been really owing to his own negligence, the court will not permit him to take advantage thereof; as if he does not put the bail-bond in suit so early as he might have done, and defendant, when it is put in suit, immediately applies

But he ought to put bail bond in suit with due diligence.

Of the Assignment of the Bail-bond.

to stay the proceedings, the court will stay them upon the usual terms, and payment of costs, without granting the bail-bond as a security, because the delay was occasioned by plaintiff's own default. *Hutchinson v. Hardcastle*, Bar. 103.

The effect of the bail-bond standing as a security in B. R.

When the proceedings are thus stayed, and the bail-bond stands as a security, if the plaintiff succeeds in the original suit, and afterwards renews the action on the bail-bond, the bail cannot plead that their principal *comperuit ad diem*; but the court will give leave on motion to enter up judgment against them immediately. *Otway v. Cockayne*, Bar. 85. Nor can the bail discharge themselves by a surrender.

In C. B.

But in C. B. the judgment (as before observed) is allowed in the first instance, so that plaintiff has afterwards nothing to do but sue out execution.

Courts inclined to extend this relief.

The inclination of the courts is to extend this equitable relief of staying the proceedings, to every possible case where justice seems to call for it; insomuch, that even after a *verdict* on the bail-bond, proceedings have been stayed.

Even after verdict on the bail-bond, proceedings have been stayed.

In C. B. defendant being arrested in an action by an attorney for fees, entered into a bail-bond with sureties, which, for want of bail, was assigned, and actions brought thereon, wherein plaintiff declared; defendant pleaded *non est factum*, and after verdict defendant moved for leave to file bail in the original action on payment of costs, and consenting that plaintiff might have judgment on the bail-bond to stand as a security for what plaintiff should recover; and produced an affidavit, that he never, in his own separate capacity, employed plaintiff as his attorney, and that he had a good defence; whereupon the rule was made absolute. *Birch, one, &c. v. Graves*, Bar. 74.

The most usual cases are, where the defendant wishes to try the merits.

The above, therefore, are the most usual cases in which the proceedings on the bail-bond are stayed; namely, where the defendant in the original action wishes to be let in to try the merits; and such are the terms upon which he is permitted so to do.

But

Of the Assignment of the Bail-bond.

But there are other grounds upon which the courts will stay the proceedings.

Other grounds for staying proceedings.

Such as the death of either the plaintiff or defendant in the original action, provided such death happens previous to the time when judgment could have been obtained, had the defendant put in and perfected bail in time.

If either party die, proceedings stayed.

For the rule with respect to the death of the defendant is, that where the plaintiff might have had judgment against the original defendant, in case he had been guilty of no negligence, the bail below are liable for the whole debt and costs, and not merely the sum sworn to. But where the plaintiff could not have had judgment in the original action, the proceedings may be stayed upon payment of costs only. *Orton and others v. Vincent*, Cow. 71.

The general rule as to the terms upon which they are stayed in such case.

And with respect to the death of the plaintiff, the rule also is, that if the plaintiff in the original action dies before judgment could have been recovered therein, proceedings shall be stayed. *Willoughby v. Rhodes*, Bar. 70. If not till after judgment might have been obtained, his executor may proceed on the bail-bond, and the bail are liable for the debt and costs. *Nutkins, executor, v. Wilkin*, Bar. 96.

Which rules are founded upon the equitable principle already mentioned, and by which the courts are governed in staying the proceedings; namely, that the plaintiff shall be put in as good a condition as he would have been in had the defendant been guilty of no laches.

The reason thereof.

Upon the same principle, where the capias in the original action was returnable first return of Hilary, and defendant had obtained time by several orders to perfect bail till the last day of that term, taking notice of trial for the sittings after, but bail not being perfected, the bond was assigned and put in suit, and defendant in the original action died 8th of April, whereupon the bail applied to stay proceedings upon payment of costs, the defendant having died before judgment could have been obtained against him; a rule nisi was granted. But upon shewing

To what extent it is carried.

Of the Assignment of the Bail-bond.

cause, the rule was discharged, the court saying plaintiff had been delayed; for if defendant had perfected bail in time, plaintiff might have tried his action at the sitting after Hilary; and by statute 17 Car. 2. might have entered his judgment therein after defendant's death. *Morley v. Carr*, Bar. 112.

An exception
therein.

But if the plaintiff, from his own default, neglects to take an assignment of the bail-bond, and proceed thereon, and thereby occasions a delay, and the defendant dies before judgment obtained on the bail-bond, the proceedings will be stayed thereon upon payment of costs only.

If plaintiff has
been guilty of
delay in putting
bail bond in
suit.

The original action was in Michaelmas term, and for want of bail above, the bail-bond was assigned in February, after which defendant died, and bail moved to stay proceedings, plaintiff not having got judgment on the bond. On hearing counsel, the court ordered proceedings to be stayed on payment of costs, being of opinion that the matter was never carried further, than the bail-bond standing as a security for what should be recovered on the original trial; and if that had been the case, and defendant had died before the trial, the suit would have been at an end. The plaintiff might have proceeded more speedily; and if inconvenience happens to him, it is his own laches. *Heath v. Aspley*, Bar. 61. *Davenport v. Wall*, ib. 62.

The bankruptcy
of defendant,
and his certifi-
cate,

Again, if the defendant, in the original action, becomes a bankrupt, and obtains his certificate, and afterwards the bail-bond be put in suit against the bail, proceedings will be staid. *Sanders v. Spincks*, Bar. 105.

Sometimes a
ground for stay-
ing proceedings.

But if the defendant in the original action did not obtain his certificate until *after* the bringing of the action upon the bail-bond, (though such certificate was founded upon an act of bankruptcy *prior* to the bringing of such action upon the bail-bond,) the bail-bond is *not thereby discharged*, although the *original* debt is, because the action upon the bail-bond was for a *new and distinct cause of action*. *Cockerill v. Owlston*, Bur. 436.

Such

Of the Assignment of the Bail-bond.

Such certificate indeed would have discharged the proceedings depending against bail in an action upon the old debt, if they were *not already fixed*. *Woolley v. Cobbe*, Bur. 244.

Where the defendant, in the original action, becomes a bankrupt, plaintiff may prove his debt under the commission, and afterwards, provided the defendant has not obtained his certificate, and does not put in bail above, may proceed upon the bail-bond; and this, although two terms have elapsed since the writ was returnable.

Plaintiff may prove his debt under the commission, and yet proceed on bail-bond.

The defendant was, on 18th July 1783, arrested on a bill of Middlesex, returnable on Thursday next after the Morrow of All Souls, and gave bond; he became a bankrupt before the return of the writ, and the plaintiff, 12th August, proved his debt: the defendant did not put in bail above, as he ought, four days after the return, nor did the plaintiff proceed by filing a declaration. The defendant not having obtained his certificate, plaintiff, 30th April 1784, took an assignment of the bond, sued out and served writ thereon, and declared 1st May. Defendant laid these facts before the court, and moved to set aside the proceedings. Upon shewing cause, it was alleged, that the case in 2 Str. 1262. was in point; and on the part of the defendant it was contended, that the plaintiff not having delivered a declaration *within two terms*, he was out of court, and therefore ought not to take the bond, and that his having proved his debt under the commission, he had waived all proceedings. But the court held, that nothing was a performance of the bond but putting in bail above, and discharged the rule. *Carmichael v. Chandler*, Imp. K. B. 150.

Although he has laid by and neglected to put bail-bond in suit for two terms.

Again, if through a mere mistake of the defendant, or his attorney, the bail-bond has been put in suit, the court will stay the proceedings, in order that such mistake may be rectified.

Another ground of staying proceedings,

Defendant moved for ten days time to put in bail; and that upon putting in good bail, paying costs, pleading the general issue, and taking notice of trial within term, proceedings on the bail-bond might be stayed. On shewing cause,

where bail-bond is assigned through a mere mistake of defendant,

Of the Assignment of the Bail-bond.

cause, it appeared that plaintiff had sued out a *testatum* attachment of privilege from Middlesex into Yorkshire, and bail was taken as in a country cause, and filed with the filazer of Yorkshire, (instead of being filed with the prothonotary,) and in order to give defendant time to rectify the mistake, the rule was made absolute. *Garnett v. Heavyside*, Bar. 63.

In another case, the writ was returnable in Michaelmas term; bail was taken before a commissioner, notice thereof given, and the bail-piece was transmitted to defendant's agent; he incautiously filed it with the filazer, who as incautiously received it without being allowed by a judge; plaintiff laid by till Easter term, and then put the bond in suit. The court ordered the filazer to attend a judge for his *allocatur*, gave plaintiff leave to except against the bail, and stayed proceedings on the bail-bond; and it being urged, that plaintiff had lost a trial, the court said it was through his own laches. Bar. 103.

Of staying the proceedings,

The last ground which I shall mention for staying the proceedings is, upon payment of the debt and costs.

upon payment of debt and costs,

Proceedings on the bail-bond will be stayed upon the payment of the principal, interest, and costs, into court, *Butler v. Rolls*, 3 Salk. 56.; but not after notice of trial given; unless it be paid within such time as not to delay plaintiff from going to trial. Ib. 6 Mod. 25.

What costs must be paid.

In debt on bail-bond, defendant moved to stay proceedings, having paid his principal's debt and his own costs, all but forty shillings, which he had tendered. But the court of C. B. on considering precedents, held, that the costs of the actions against the *principal*, and the *other bail*, must also be paid before proceedings could stay. *Walker v. Carter*, Blac. Rep. 816.

(C 3)

(C. 3.) *In what Cases Proceedings on the Bail-bond will be set aside.*

It has been before observed, that if the assignment of the bail-bond, and the proceedings thereon, have been *regular*, the relief granted by the court is, to *stay* the proceedings,

Of the Assignment of the Bail-bond.

ceedings, which is done upon certain terms agreeable to the circumstances of the case, and always upon payment of costs; because such proceedings could never have been regular unless the defendant had been in fault. But if such proceedings are *irregular*, the relief then granted is, to *set aside* the proceedings, and the plaintiff to pay the costs incurred by such irregularity.

The grounds of application, therefore, to set aside the proceedings, must be as various as the irregularities themselves; and these may be either in the *writ*, or the *return*, or in the *arrest*, or in excepting to the bail, or in the *bail-bond* itself, or in the *assignment* thereof; and which, in a great measure, may be collected from the different sections in the former part of this work, under which the respective heads of practice are treated of.

Upon what grounds proceedings set aside, for irregularity.

If a rule be obtained to shew cause, &c. "and why all proceedings in the mean time should not be stayed," and pending such rule an assignment of the bail-bond is taken, it will be set aside, as having been made too soon, because the proceedings are totally suspended by an act of the court. *Swayne v. Crammond*, 4 D. & E. 176.

If bail-bond be assigned pending a rule of court.

If an assignment be made of the bail-bond, and proceedings, even to judgment and execution against the bail, had thereon, where the principal died between the arrest and the return day of the writ, court will set same aside. *Hutchinson v. Smith*, 8 Mod. 240.

If defendant died between the arrest and return day,

So if the bail-bond be assigned after the death of the original defendant, the court will stay proceedings against the bail. But if it appears, that plaintiff knew not of the death of the principal, they shall pay costs. *Kingston v. Holloway*, 1 Com. Dig. 492. 374.

or before assignment of the bail-bond.

So if defendant has surrendered in discharge of his bail before the bringing of the action on the bail-bond, it is a ground of application to set aside the proceedings.

If defendant has duly surrendered.

Nor is it any objection, that the surrender was made after an exception against the bail, and without their justifying. *Phillimore v. Moore*, Bar. 117. Blac. 758. 1179. Vide ante, sec. 6. A.

What surrender good.

Of the Assignment of the Bail-bond.

But a surrender of the defendant made to the sheriff before the return of the writ, and before bail put in, is not sufficient to stay, or set aside the proceedings on bail-bond, as nothing can be a performance of the condition of the bail-bond, but putting in bail. *Harrison v. Davies*, Bur. 2683.

(C 4.) (C 4.) *In what Manner the Proceedings are to be stayed, or set aside.*

Proceedings to be stayed or set aside by summons or motion.

The manner in which proceedings are stayed, or set aside, is either by a *summons* before a judge, or *motion* in court. If in vacation, the *former* will do, or even in term, if it be merely a common case, to stay proceedings on payment of costs; but if it be to stay proceedings when plaintiff has lost a trial, it should be the *latter*, and the court should be moved on a special affidavit containing the merits. So to set aside proceedings for irregularity, should be by motion; and this the rather, because the court will subject the defendant to the costs incurred. Except in *vacation*, then in both of the last-mentioned cases, *summons* will do.

Which should be done without delay.

The summons should be taken out, or the court be moved without delay, so soon as the action on the bail-bond is brought.

How summons intitled.

The summons should be intitled, *in the original action.*

In B. R. notice must be given to put in and perfect bail.

In B. R. notice must at the same time be given, that defendant will put in and perfect bail on such a day, (which should be two days exclusive of the day given,) and plaintiff may, if he thinks fit, except to such bail without any prejudice to his action on the bail-bond.

How in C. B.

In C. B. indeed, defendant cannot move to stay proceedings on bail-bond before he has put in and justified bail in the original action. *Boughton v. Chaffey*, 2 Wil. 6.

In B. R. plaintiff may now except to such bail without its being a waiver.

It was formerly the practice in B. R. that if, after regular bail had been put in, plaintiff excepted thereto, it was held a waiver of proceedings on the bail-bond; so that did he *not* except to them, he might be put off with bad

Of the Assignment of the Bail-bond.

bad bail in case the proceedings on bail-bond were set aside; and *did* he except to them, he himself waived the proceedings on bail-bond; which the court deeming a great hardship, made the following rule, that—Whenever the defendant is guilty of a neglect in not putting in bail in due time, by which the bail-bond becomes forfeited, the *notice* (in case the party means to put in bail in order to stay proceedings on the bail-bond) should be, that he will put in and *perfect* bail such a day (analogous to the case where the sheriff is ruled, who, before he can discharge himself, must give notice that he will put in and perfect bail); and in that case, the plaintiff may oppose the bail in court without its being a waiver of the bail-bond. *Bolders v. Gray*, Cow. 769. 18 G. 3. B. R.

When the judge's order is obtained, or the rule granted to stay proceedings, which is upon terms, and always that the defendant shall pay costs, to be taxed by the master, it is incumbent upon the defendant immediately to get an appointment thereon from the master to tax the costs, and to serve a copy upon plaintiff's attorney; and when the costs are taxed, to pay the same without delay.

What steps must be taken by defendant, when order is obtained, or rule granted.

When the court is moved to *set aside* proceedings for irregularity, proper notice thereof should be given to plaintiff's attorney; a copy of which notice, together with an affidavit of the service thereof, must be produced in court to support the motion.

Notice of motion to set aside proceedings must be given.

After the proceedings on bail-bond are stayed, defendant cannot plead in abatement to the original action, but must plead in chief. *Salk.* 519.

Defendant cannot afterwards plead in abatement.

SECTION VIII.

Of proceeding against the Sheriff, called ruling the Sheriff.

It has been before observed, (page 183.) that in case the defendant should not appear according to the condition of the bail-bond, and put in and perfect bail above in due time, the plaintiff has two remedies at his election;

Of proceeding against the Sheriff,

tion: the one, by getting the bail-bond assigned, and prosecuting the sureties mentioned therein, which was considered in the last section; the other, (of which we are now about to treat,) by proceeding against the sheriff to compel him either to put in good bail, or himself to satisfy plaintiff's demand.

Plaintiff cannot
rule the sheriff
after assignment
of bail-bond.

This mode of redress against the sheriff cannot be had if plaintiff has once taken an assignment of the bail-bond; for by that very act he makes his election of the remedy to which he means to resort, and thereby discharges the sheriff. Whenever, therefore, the defendant fails in putting in and perfecting bail in due time, and the plaintiff is not well satisfied with the responsibility of the sureties mentioned in the bail-bond, he must avoid taking an assignment thereof, and he will then be entitled to proceed against the sheriff.

Explanation of
this proceeding
against the sher-
riff.

The sheriff has the execution of all writs and process. When an action is commenced, the writ upon which the defendant is to be arrested is directed and delivered to the sheriff; he either makes the arrest himself, or issues his warrant to one of his bailiffs to make it. The party being arrested, enters into the bail-bond, (of which so much has been already said,) conditioned for his appearance at the return of the writ, which appearance is putting in and perfecting bail above. If, therefore, upon the return of the writ, or within the time allowed by the practice of the court for that purpose, the defendant does not so appear, the plaintiff has a right to call upon the sheriff, to know in what manner he has executed the writ delivered to him at the plaintiff's suit; and this is done by obtaining a rule of court for the sheriff to return the writ. The sheriff having, in fact, taken and arrested the defendant, can only make his return accordingly; for otherwise an action on the case might be brought against him for a false return; he therefore returns the writ, indorsed *cepi corpus*; after which another rule is obtained for him to *bring in the body*. Being unable to comply therewith, as the defendant is at large on the bail-bond, the sheriff is now compelled either to put in and perfect bail above to the action, which is the main object of this proceeding against him, and which he is permitted

called ruling the Sheriff.

mitted to do to exonerate himself, or he must himself answer the plaintiff's demand; for if he fails to bring in the body, plaintiff, at the expiration of the rule, may obtain an attachment against the sheriff, by which he is then fixed for the payment of the plaintiff's debt and costs.

The mode of proceeding against the sheriff is as follows:

In B. R.

Upon the return day of the writ, take out a rule from the clerk of the rules, to return the same; pay 4s. If in London or Middlesex it is a four-day rule; if elsewhere, fix days. Serve copy of rule (if in London) on the deputy secondary, at the office in the Poultry, or Wood-street, where your warrant was taken out. If in Middlesex, at the sheriff's office in Took's-court, Curfitor-street. At the time of service shew the original rule, and put upon the copy the officer's name who arrested defendant; at the expiration of the rule, search with the custos brevium, at the Treasury-chamber, Westminster-hall, for return of writ. If it be returned cepi corpus, and bail be put in, in due time (but not otherwise), immediately except against them before the service of any other rule; then, at the same office, get another rule on the sheriff to bring in the body, which is, as before, a four-day rule in London or Middlesex, and a fix-day rule elsewhere. Serve copy thereof on sheriff, or his deputy, as before; and if the bail do not justify on or before the expiration of the rule, make an affidavit of the service of the rule, and let counsel move for an attachment

In C. B.

Upon the first day of term, or quarto die post of any other return, get a rule from the secondary, pay 4s. 6d.

How to rule the sheriff to return the writ.

Custos Brevium, Brick-court, Temple.

How to rule him to bring in the body.

Carry this rule to the filazer, who will give you a rule for sheriff to bring in the body; take that to the secondary, who will give you a rule peremptory to bring in the body.

Of proceeding against the Sheriff,

*attachment against the sheriff
for not bringing in the body pur-
suant to rule.*

**How to move for
an attachment
against the she-
riff.**

But if after the rule to return writ, upon searching at the Treasury-chamber, no writ be found, or if, after the rule to bring in the body, no bail be put in, either by sheriff or defendant, or if bail be put in, but do not justify, then move for an attachment (a) against the sheriff upon an affidavit, stating, in the first case, "the service of the rule annexed, the search with the *custos brevium*, the term the writ was returnable, and none to be found;" and in the second, "the service of the rule, and that no bail has been put in for the said defendant, the same having been searched for with the proper officer;" and in the third, "that the defendant did put in bail, but hath not justified the same, and the rule for bringing in the body is expired."

Get the rule, in the evening, at the clerk of the rules for the attachment, carry it to the crown-office, and one of the clerks there will make out your attachment; pay 13s. 4d.; carry attachment to the coroner, with your bill of costs, who makes out warrant thereon, and attaches sheriff. On return of attachment, call on coroner, who will pay you the money; if he refuse, get a rule at the crown-office for him to return the writ of attachment; if not returned, make affidavit thereof, and court will grant an attachment, and direct it to be executed by two *elizors*, being two persons named for that purpose by the master.

Of

(a) By rule in *B. R. Mich.* 32 G. 3. it is ordered, that in future all writs shall be returned by the sheriff on the day in which the rule for returning the same shall expire, and in default thereof the plaintiff shall be at liberty to move for an attachment on the next day.

Get the rule, in the evening, at the secondary's for attachment, make out same yourself, on 2s. 6d. stamp parchment, carry it to the protobonotary's; signing 1s. 4d. sealing 7d.

The secondary's.

called ruling the Sheriff.

Of Proceedings where Sheriff is out of Office.

How if Sheriff is out of office.

When sheriff goes out of office, he must be called upon within six months afterwards to return the writ.

Formerly the proceeding could only be by distringas, as follows:

Get a rule for that purpose, (naming him as last sheriff,) serve it as above. If he return cepi corpus, sue out a distringas, (in order to compel him to bring in the body,) direct it to the present sheriff, ordering them to distrain the late sheriff, for that purpose; it is to be left at the sheriff's office for four days exclusive. Sheriff will then return it on 40s. issues; sue out an alias, move to increase the issues; a side-bar rule will do. Having got the rule, serve sheriff with copy, and leave the alias writ of distringas. If not sufficient issues, then sue out a pluries, and so on till having issues to satisfy your demand; make affidavit of the several writs sued, and the returns thereon, and move the court according to 10 G. 3. c. 50. s. 3. for to order the issues levied from time to time to be sold, and the money arising thereby to be applied to plaintiff's costs, and surplus to be retained till defendant appear, or other purpose of the writ be answered.

But now, by a late rule in B. R. this proceeding by distringas is rendered unnecessary, since a much quicker remedy, by rule of court is allowed; for by rule Trin. T. 31 Geo. 3. it is ordered, that from and after the last

In C. B. get a rule at the secondary's, as before, for sheriff to return the writ; if he returns cepi corpus, get a note of same from custos brevium, take it to the filazer for his rule to bring in the body, then take same to secondary's office, as before, who will give you a rule peremptory to bring in the body; serve copy thereof, and proceed by attachment, just as in other cases, and as above-mentioned, which is certainly more preferable than as in K. B. by distringas. Though now, by the late rule of that court, Trin. 31 Geo. 3. which see opposite, the mode of proceeding in B. R. may be equally expeditious as in C. B.

N. B. The mode of proceeding in C. B. is the same as in B. R. except where the difference is pointed out as above.

Of proceeding against the Sheriff,

last day of this term, where any sheriff, before his going out of office, shall arrest any defendant, and cepi corpus shall be returned, he shall and may within the time allowed by law, be called upon to bring in the body, by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted.

Having shewn the general practice, as to the mode of proceeding against the sheriff, we will now more particularly treat,

A. Of ruling Sheriff to return the Writ, and how the Rule is to be served.

B. Of ruling Sheriff to bring in the Body, and what he must do in consequence thereof.

C. Of moving for an Attachment against Sheriff, and of the Nature and Operation thereof.

D. In what Cases the Attachment will be set aside, or Proceedings stayed against the Sheriff.

E. Of proceeding against the Coroner to return the Attachment.

F. Of proceeding against Sheriff, when out of Office, to return the Writ, and bring in the Body.

3. A. Of ruling Sheriff to return the Writ, and how the Rule is to be served.

Plaintiff cannot rule the sheriff after an assignment,

If plaintiff accepts an assignment of bail-bond, he cannot have a rule for the sheriff to return the writ. *Ld. Brooke v. Stone*, 1 Wil. 223. Sal. 99. 3 Sal. 57.

If the bail-bond be valid; but otherwise it is void.

But that is, provided the bond is *valid*, as the assignment thereof then amounts to a return of the writ; but if it be a *void* bond, as having been executed after the return of the writ, or otherwise, plaintiff may then have a rule upon the sheriff, as if there had been no assignment. *Ld. Brooke v. Stone*, 1 Wil. 223.

A fide-

called ruling the Sheriff.

A side-bar rule, for the sheriff to return the writ, having been obtained, pending an action where there was a demurrer to a plea vitiating the bail-bond, court refused to discharge the rule, notwithstanding the assignment of bond to plaintiff, but only enlarged it, till by the event of the suit it was proved whether the bond was good or not. *lb. 1 Wil. 223.*

But where a special bailiff has been nominated by plaintiff, or his agent, the sheriff is not bound to return the writ; and should the usual peremptory rule be made against the sheriff, in such case, to return the writ, the court, on motion, will discharge it. *Hamilton v. Dalziel, Blac. 952.*

Sheriff not bound to return the writ where a special bailiff is appointed.

A rule, calling on sheriff to return writ, must not be sued out in vacation; for if it be, though it is tested in term time, it is irregular, and an attachment grounded upon it will be set aside by the court, on motion. *The King v. the Sheriff of Cornwall, 1 D. & E. 552.*

When rule must be sued out.

All rules upon sheriffs should be served on the under-sheriff, though the rules should be *as against* the sheriff; for, on motion for an attachment against the sheriff, for not returning a writ upon an affidavit of service of the rule on the under-sheriff, *per cur.* be it so, the attachment must be against the sheriff, and the service is proper on the under-sheriff, *Bar. 30.* And where an under-sheriff shut himself up, and could not be personally served with a rule to return a *capias*, a rule was ordered, that leaving a copy at his house should be good service. *Richardson v. Bailly, Bar. 35.*

How such rule to be served.

If a person, in fact, be not the under-sheriff, but yet acts as such, rule served on him will be good, and court will afterwards grant an attachment upon affidavit of such notice. *Caf. of Prac. C. B. 123. P. R. 381. Arne v. Neeler.*

But if a rule be obtained against a sheriff, to return a writ, service on the under-sheriff's *agent* in town is not sufficient.

Rules, however, against the sheriffs of London, Middlesex, and Surry, seem an exception, and may be served on the agents; because the offices of the agents for the

under-

Of proceeding against the Sheriff,

under-sheriffs of those counties are, in truth, considered as the offices of the under-sheriffs themselves; but if the rule were served on the agent any where but at the office, the service would be bad, even in the cases of London, Middlesex, and Surry. *The King v. Coles*, Do. 420.

Indeed it is the safest and best way to serve such rules on the under-sheriffs.

Form of the rule.

The form of the rule, in both courts, should be, that the sheriff shall do the act required, upon notice to his under-sheriff.

Of the time allowed by the rule to return the writ.

N. B. In most of the cases here cited, the rules upon the sheriff appear to be *six*-day rules; the reason is, because it was not till the 6 Geo. 3. that any others were allowed, when the court made a rule, "that the sheriffs of *London and Middlesex*, who before could not be compelled to return their writs, and bring in the body till after *six* days, should be obliged to do it within *four* days." But the country sheriffs still have *six*, that rule not affecting them. *Bur.* 1921.

Must be returned punctually on the last day.

And by a late rule in B. R. Mich. 32 G. 3. all writs must be returned by the sheriff on the day on which the rule for returning the same shall expire, and in default thereof, the plaintiff shall be at liberty to move for an attachment on the next day.

This rule arose out of a case of the *King v. the Sheriff of Surry*, where the sheriff had not returned the writ till the morning of the 7th day, although before the sitting of the court; to remedy which practice the above rule was made. 4 D. & E. 496.

How to proceed if bail below become bail above in B. R.

It has been before observed, (page 162,) that in B. R. when the bail below become bail above, you cannot except to them, so as to make them justify in the ordinary way; but if you do not approve of such bail, you may, in effect, compel their justification, as follows: First, enter an exception, as in other cases; then serve the sheriff with a rule to return the writ, if not already returned; and after return made, with a rule to bring in the body, which will oblige the bail to justify, or defendant to put in such bail as will.

B. Of

called ruling the Sheriff.

B. Of ruling the Sheriff to bring in the Body, and what he must do in consequence thereof.

B.

Upon the rule to return the writ being properly served, the sheriff either neglects to make any return, or he must obey the rule by returning *cepi corpus*; if he does the former, plaintiff may have an attachment against the sheriff for not returning the writ pursuant to rule; for he cannot have a rule to bring in the body, till it appears by the return of the writ that he has taken the defendant; but if he returns *cepi corpus*, then he may sue out another rule for him to bring in the body.

What sheriff must do when served with rule to return the writ.

But where bail above is put in, in due time, and proper notice thereof given, an exception to such bail ought to be made, and notice of exception given to defendant's attorney before service of the rule to bring in the body.

What must be done before sheriff is ruled to bring in the body.

If notice of exception be not given, a rule on the sheriff to bring in the body cannot be supported, and this, although the defendant had, on his part, waived the irregularity by giving a notice of justification; for it is no waiver by the sheriff. *Rogers v. Mapleback*, 1 C. B. T. R. 107. & vid. *infra*, *Cohn v. Davis*.

There must be an exception to the bail, if any put in.

And this exception must be regularly made.

Defendant put in bail before a judge; plaintiff gave notice of exception, but did not enter the exception on the bail-piece, and for want of a justification in court, served the sheriff with a peremptory rule to bring in the body in six days; for want whereof, plaintiff moved for an attachment against him. The court held, that an exception in writing on the bail-piece, and notice thereof to the defendant's attorney, are both necessary; and that for want of the former, the bail (who had stood more than 20 days without exception entered) was become absolute, and ordered proceedings against the sheriff to be stayed. Bar. 102.

and that must be regularly made.

An exception to bail was regularly entered in the Glazer's book, of which the defendant's attorney had verbal notice; but afterwards proceeded by giving notice

P

of

Of proceeding against the Sheriff,

of justification, and attempting to justify bail, who were rejected. The rule for bringing in the body having expired, and no bail being justified, an attachment was granted against the sheriff. A rule was obtained to shew cause why this attachment should not be set aside, on the ground, that a *written* notice of exception was not given to defendant's attorney; and on cause shewn, *per cur.* where there are two parties, and one of them takes a step, previous to which the other ought to have taken a step, the former waives the obligation which the latter was under, as between themselves; but not as relating to a third person. Here the waiver by the defendant, if it were one, was not a waiver by the sheriff. The rule ought to be strictly followed to prevent confusion. *Cohn v. Davis*, 1 T. R. C. B. 80.

The intent of the rule to bring in the body.

The sheriff having been ruled to return the writ, and having returned the same with a *cepi corpus*, plaintiff, as before-mentioned, sues out a rule for him to bring in the body; the intent of which rule being to compel the sheriff to put in good bail above, the sheriff must put in the same accordingly.

If the sheriff returns a *cepi corpus*, or *languidus*, where the defendant is at large without any bail taken, an action for a false return lies against him. *Noy*, 39.

What sheriff must do thereon.

Upon the rule to bring in the body, it is no excuse that the sheriff had taken a bail-bond, and had permitted defendant to go at large. For it is at the peril of the sheriff he takes bail, on the stat. H. 6. and the party is not concluded thereby; the sheriff must therefore either bring in the body, or justify good bail in court. *Wolfe v. Collingwood*, 1 Wil. 262.

Must put in and perfect bail.

And in order to render the bail, when put in agreeable to this last rule, good and effectual, he must perfect the same by justifying.

Formerly they justified *de bene esse* before a judge.

There was formerly a practice of justifying bail *de bene esse*, before a judge; and it used to be held, that where sheriff was ruled to bring in the body in a certain time, justification before a judge within that time was sufficient,

called ruling the Sheriff.

sufficient, unless plaintiff excepted thereto, and then it ought to be in court. *Price v. Street*, Bar. 102.

But this practice of justifying *de bene esse*, before a judge, is now disused; and in the case of *Poole v. Peate*, in C. B. it is settled to be the practice, that sheriff must not only put in bail when ruled to bring in the body, but must also *perfect* bail by justifying in court; and this, although *no exception* to such bail has been made by plaintiff. 2 Blac. Rep. 1206.

But now that practice is disused.

The justification must be made within the time allowed by the rule for bringing in the body, otherwise an attachment may be moved for. But although the rule for bringing in the body has expired, yet if the defendant justifies his bail before the plaintiff moves for an attachment, the sheriff is not liable to the attachment. *Thorold v. Fisher*, 1 C. B. T. R. 9.

Within what time sheriff must justify.

Rule for sheriff to bring in the body in six days, which the sheriff did not, plaintiff moved for an attachment, and had a rule to shew cause; the sheriff shewed for cause, that bail was put in and justified; but it appearing, that they had not justified before plaintiff applied for the attachment, the court ordered, that on payment of costs, the rule should be discharged. *Henley v. Anderson*, Bar. 80.

Defendant was arrested last term, but no bail-bond taken. The sheriff being called upon, returned a cepi; and being served with a peremptory rule to bring in the body, bail was perfected in court, and the rule to bring in the body discharged; but the sheriff was ordered to pay the costs of the application, as the time for bringing in the body was expired, and the plaintiff entitled to move for an attachment. *Peeffson v. Tracy*, Bar. 98.

The sheriff, when ruled to bring in the body, may put in bail for defendant without his consent, and justify the same in order to prevent an attachment.

Sheriff may put in and perfect bail without defendant's consent;

In the case of *Macleed v. Marsden*, Bar. 32. the question was, whether a rule to bring in the body, after cepi returned,

And this, although defendant has escaped;

Of proceeding against the Sheriff,

but not if he be
in actual cus-
tody.

returned, ought to be discharged or not? it being suggested, on behalf of the sheriff, that defendant was in custody, and had remained in gaol ever since the arrest; but the fact appeared otherwise, and defendant had been suffered to escape. *Per cur.* had the sheriff shewn defendant to have been in actual custody, the rule ought to be discharged; but as there is an escape, the rule should be obeyed, otherwise an attachment must be granted. But, by consent, the debt and costs were to be paid in a month, with five pounds for the costs of the motions.

How, if sheriff
go out of office
between the ser-
vice and expira-
tion of rule.

A sheriff who is ruled on the last day of a term to bring in the body, but goes out of office before the next term, is liable to an attachment for not bringing in the body. *Meekins v. Smith*, 1 C. B. T. R. 629.

C.

C. Of moving for an Attachment against the Sheriff, and of the Nature and Operation thereof.

When to move
for attachment.

If the sheriff disobey the rules served upon him, that is to say, if, upon the rule to return the writ, he makes no return thereof, or if, upon the rule to bring in the body, the intent of which is, to compel the sheriff to put in and perfect bail, he neglects so to do, plaintiff may move the court for an attachment against him.

It is a criminal
process.

The attachment is a criminal process; it must be made returnable on a general return, though the original process was on a day certain. Str. 624.

How proceed-
ings thereon en-
titled.

A motion for an attachment, therefore, in the course of a civil suit, ought to go on the crown side of the court, and the affidavits entitled, "The king against the person to be attached," because it is not a motion in the cause, but arising out of it. *The King v. the Sheriff of Middlesex*, 3 D. & E. 133.

But until an attachment is moved for, the proceedings are on the civil side of the court, and must be entitled by the names of the parties.

Against whom it
will lie.

An attachment now lies in both courts against the present, or late sheriff, either for not returning the writ, or for
not

called ruling the Sheriff.

not bringing in the body; although, until the late rule of King's Bench, Trin. 31 Geo. 3. it would only lie in that court against the *present* sheriff in the *latter* case; the mode of proceeding against the late sheriff being by *distingas*.

The rule to return the writ, or to bring in the body, is a six-day rule, except for the sheriffs of London and Middlesex, who have only *four* days allowed them after the service thereof; if not done in that time they are liable to an attachment, without further rule.

When granted,

But it is to be observed, that this is upon the supposition, that these rules, calling upon the sheriff, do not expire before the time has elapsed in which the defendant might have put in or perfected bail. For, in all these cases, the same time shall be given to the sheriff to do the act in, as would have been allowed to the defendant. For if it were otherwise, and by any contrivance of getting an immediate return of the writ, the rule to bring in the body should expire before the time had elapsed for defendant to put in bail; the consequence would be, that after the sheriff was fixed, the defendant to an action on the bail-bond, might plead *comperuit ad diem*, and so deprive the sheriff of his remedy. *Spicer v. Linnell*, East. 23 G. 3. Imp. K. B. 159.

If the attachment goes against the present sheriff, it should be directed to the coroner; but if against the late sheriff, it should be directed to his successor.

How to be directed.

A motion for an attachment should be grounded upon an affidavit, stating, that the defendant was served *personally* with a copy of the rule, and that the original was shewn to him at the same time. The *King v. Smithies*, 3 D. & E. 351.

Of the affidavit necessary to support the rule.

But if the affidavit should not be full enough, and the fact was so, the court will allow the prosecutor to make an additional affidavit as to that fact. *Ib.*

An attachment against a sheriff may be moved for the last day of term. *Bur. 651.*

It may be moved for the last day of term.

Of proceeding against the Sheriff,

But no attachment unless the bail put in is excepted to.

If bail have been put in who did not justify in time, plaintiff cannot move for an attachment against sheriff, unless he had regularly *excepted* to the bail. Loft. 159.

Except such bail be put in after rule served.

But this must be understood to mean, where bail is put in before any rule served to bring in the body; for if bail be put in after rule served, bail must justify, though no exception, and it would be absurd to except; but if plaintiff should do so, he lets in defendant to justify his bail at any time within four days after exception.

The operation of the attachment.

The operation of the attachment is, the fixing of the sheriff with payment of the debt and costs. He must seek his remedy over, either upon the bail-bond given to him, or against the officer who arrested the defendant, or his sureties; or in London, against the secondary of the Compter, or officer who took the bail-bond, if any, or his sureties.

How far sheriff liable.

In the Common Pleas, the sheriff is liable, upon an attachment, to pay the plaintiff the *whole debt* due, and costs, *beyond the sum sworn to*, and indorsed on the writ, to the amount of the penalty in the bail-bond, in the same manner as the bail would have been, had good bail been put in. *Fowlds v. Mackintosh*, 1 C. B. T. R. 233.

But it seems, in B. R. that he is only liable to the payment of the sum sworn to, with the costs; the bail being, in this court, liable to no more. Vid. ante, page 157.

D.

D. In what Cases the Attachment will be set aside, or Proceedings stayed against the Sheriff.

In what cases defendant may be let in to justify bail, and try the cause, after sheriff is fixed.

It used to be the received notion, that when the sheriff was once fixed, by an attachment having regularly gone against him, bail could not justify, nor could the attachment be set aside; but that the utmost that could be done was, for the court, upon application, to let in the defendant to a trial upon terms, provided he had merits, and in the mean time to *stay* the proceedings against

called ruling the Sheriff.

against the sheriff upon the attachment. Tid. 166.
Loft. 438. *Overton's case*, in 26 G. 3.

But the practice is now otherwise; for the courts are governed by the same principle, in letting the defendant in to try the merits of the original action after an attachment is issued, as they are in letting him in after the bail-bond has been assigned.

The rule therefore is, that whenever bail have justified, (although after the attachment against the sheriff has issued,) if the plaintiff has not been delayed from going to trial, the attachment will be set aside upon payment of costs only; but if plaintiff has lost a term, that is to say, a trial, then the attachment will remain in the office, and stand as a security to plaintiff, in case he should obtain a verdict.

The rule to bring in the body expired on the 6th; an attachment against the sheriff, for not bringing in the body, was moved for upon the usual affidavit, and obtained on the 7th; upon the 8th defendant justified his bail in the cause, and on the same day moved, that the attachment should be set aside, upon payment of costs, bail having justified, and no trial having been lost, which was granted accordingly; and the court said, that the distinction contended for, between the case of setting aside an attachment when no trial had been lost, and staying proceedings on a bail-bond, under the same circumstances, had no foundation. *White v. Dunbar*, 32 G. 3. *S. P. Hill v. Bolt*, 4 D. & E. 352.

But upon a similar application, where it appeared that a trial had been lost, the court ordered the attachment to remain in the office as a security for the plaintiff's debt, and the defendant to consent to go to trial at the sittings after term. *Gravett v. Williams*, 4 D. & E. 352. n.

The defendant is also let in upon the same terms, *mutatis mutandis*, as in the case of staying or setting aside proceedings upon the bail-bond; indeed the proceedings are so analogous, that it may be useful for the

Of proceeding against the Sheriff,

reader to refer for further information on this subject to the 7th section of this chapter, C. 7.

But where the sheriff has been guilty of any fault, or laches, to the detriment of plaintiff, court will not set aside attachment.

Attachment not set aside if sheriff has been in fault,

A rule was made in C. B. for an attachment against the sheriff for not returning a *capias*; whereupon the sheriff caused bail to be put in, and justified in court, and moved to discharge the rule for an attachment on payment of cost. Rule to shew cause, which was afterwards discharged; it appearing that the parties had been before a judge, who had made an order, by consent, that proceedings should be stayed on payment of debt and costs, to be taxed; and that plaintiff had been delayed two terms; and the counsel for the sheriff refusing to consent to go before the prothonotary, on the foot of the judge's order, the court were of opinion, that the rule for the attachment ought to stand. *Miller v. Vicaridge*, Bar. 28.

But if the sheriff, or returning officer, has done all in his power, and acted uprightly, he shall not be criminally punished by an attachment, although the rule of court may not be obeyed.

Not otherwise if he has done all in his power, and acted uprightly.

An attachment issued against the high-bailiff of Westminster for not bringing W.'s body into court pursuant to a peremptory rule, and having been examined upon interrogatories, it was referred to the prothonotary, as usual, to examine whether he had cleared himself of the contempt or not? the prothonotary reported specially, and the fact appeared, "that W. being confined in the Gatehouse for a criminal matter, was, by leave of the judge, charged with a bailable action by a *capias* ad resp. directed to the sheriff of Middlesex, who made a mandate to the high-bailiff, who charged W. therewith in custody; which W. afterwards escaped from the Gatehouse, which is the prison for the Liberty of Westminster, and to which the high-bailiff is obliged to carry his prisoners within twenty-four hours after arrest. That the high-bailiff and keeper of the Gatehouse are appointed by,

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by, and hold their places under the dean and chapter of Westminster, and both give security to them; but the keeper gives no security to the high-bailiff."—On this report the court were of opinion, that the high-bailiff had cleared himself of the contempt, and ordered the attachment to be discharged, the high-bailiff having done every thing in his power to secure the prisoner, and ought not to be criminally punished, *respondeat superior* extends to civil cases only;—the prosecutor may bring his action for the escape. *The King v. Lever*, high-bailiff of Westminster, Bar. 34.

Again, no attachment shall issue against the sheriff, if the plaintiff is in fault, and has been guilty of any irregularity in his proceedings.

No attachment if plaintiff has become irregular.

Proceedings will be stayed against sheriff, where plaintiff has been guilty of any irregularity, as in not giving a proper notice of exception to bail. Bar. 102. ante.

It is said, that if the persons taken by the sheriff in bail-bond be good men, and pending the suit become insolvent, he shall be excused; for the statute obliges him to take bail, and they were good at the time he took them. 1 Lil. Abr. 511. Highmore on Bail, 49.

How far sheriff liable if bail, though good when taken, is afterwards insufficient.

But, on motion to discharge proceedings against the sheriff upon the following circumstances, viz. that the bail to the sheriff was good when defendant was arrested, 4th August, and the sheriff was obliged to take bail under the statute of Henry the 6th, but the bail since were become insufficient, it was denied; the court, however, enlarged the six-day rule to bring in the body three days further. *Champion v. Townshend*, Bar. 80.

If the defendant die after the sheriff has been guilty of contempt, in not obeying any rule, though before the attachment actually issues, yet the attachment will not be stayed.

Defendant's death does not stay attachment; if sheriff be in contempt.

An attachment having been obtained against the sheriff of Middlesex for not bringing in the body, in a cause of *Robins v. Hall*, a rule was afterwards obtained to

Of proceeding against the Sheriff,

to set it aside, because the defendant in the cause died before the attachment issued, though not till after the contempt was incurred; cause was shewn this day, and the court were of opinion, that as the sheriff was in contempt before the defendant's death, the attachment was regularly issued; and though the original cause abated by his death, yet that was no reason for setting aside the attachment against the sheriff, since he was in contempt before. 3 D. & E. 133.

C. *C.* Of proceeding against the Coroner to return the Attachment,

It has been observed before, that the attachment sued out against the sheriff, is carried to the coroner, who ought duly to return same, and pay plaintiff his debt and costs; but if the coroner does not return an attachment of contempt against the sheriff, the way to compel a return is, to move for an attachment against the coroner, directed to elizors.

The coroner of Middlesex not having returned an attachment of contempt against the sheriff, the court granted a peremptory rule (in the first instance) for an attachment against the coroner, directed to elizors, pursuant to the precedent of *Andrews v. Sharp*, Blac. 911. *The King v. Peckham and Clarke*, 2 Blac. 1218.

For the more particular mode of proceeding against the coroner, see that part of the beginning of this section, which is in *italics*.

F. *F.* Of proceeding against the Sheriff, when out of Office, to return the Writ, or bring in the Body.

Sheriff must be called upon within six months after he is out of office.

By the 20 Geo. 2. c. 37. s. 2. it is enacted, *that no sheriff shall be liable to be called upon to make a return of any writ or process, unless he be required so to do within six months after the expiration of his said office.*

Unless

called ruling the Sheriff.

Unless he be required so to do] This must be by rule of court; for his having been requested by the party to return the writ, although the request were made within the six months, is not sufficient nor obligatory upon him. *The King v. Jones*, 2 D. & E. 1.

Construction of the above act.

Within six months] In this case, as in all others, where it is not otherwise expressed, six *lunar* months is meant, or six times 28 days.

After the expiration of his said office.] The day on which the old sheriff quits his office is to be reckoned one.— So that where the defendant went out of office on the 12th February, at four o'clock in the afternoon, (there being that year 28 days only in February,) and was not served with the rule to return the writ till the 30th of July following, it was held a day too late. *The King v. Adderley*, Do. 463.

If a sheriff, out of office, be called upon in due time, to return the writ, and neglects so to do, the constant mode of proceeding against him, in both courts, is by attachment; because the not returning it was a contempt of the court, and as, in strictness, he ought to have returned it before he went out of office, this contempt was actually committed whilst he was a servant of the court. *The King v. Adderley*, Do. 464.

Attachment the constant mode of proceeding against the sheriff to return the writ.

In all cases, therefore, whether against the *present*, or the *late* sheriff, the mode of proceeding for *not returning the writ* is, and always was, by attachment. So in the court of Common Pleas, the same practice always prevailed, in order to compel a sheriff out of office to *bring in the body*. But it was not so, until lately, in the court of King's Bench; for, before the rule of court of Trin. 31 Geo. 3. if a sheriff had either returned the writ, with a cepi corpus, before he went out of office, or, upon being ruled to return the writ in the usual way after he went out of office, obeyed such rule by returning cepi corpus; in either case, plaintiff could not compel him to bring in the body, by proceeding immediately against the late sheriff, by rule and attachment, but was obliged to resort to the process of distringas against

And this whether against the present or late sheriff.

And now the same mode is used to compel him to bring in the body in both courts, though formerly not so in B. R.

Of proceeding against the Sheriff,

against his successor, the present sheriff, which was dilatory and inconvenient. But now, by the rule above-mentioned, it is ordered, that "where any sheriff, before his going out of office, shall arrest any defendant, and cepi corpus shall be returned, he shall, and may, within the time allowed by law, be called upon to bring in the body, by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted."

This mode of proceeding by attachment being much preferable to the process of distringas, the latter will, of course, fall into disuse.

The rules, &c. must be served on the late sheriff.

But care must be taken to serve the rules upon, and to obtain the attachment against the *late*, and not the *present* sheriff.

On the 7th of November 1783, the late sheriffs of London were ruled to return the writ of *capias ad respondendum*; the late sheriffs returned, the defendant taken, whose body they had ready. On the 13th of November a rule was served on the present sheriffs to bring in the body, which they did not, and an attachment was granted. Now, upon motion to set aside the attachment, it appeared, that the old sheriffs returned the writ, *cepi corpus*; and also, there was returned upon the writ, thus, by the new sheriffs: "This writ, as above indorsed, was delivered to us, the under-named, now sheriffs, by the above-named late sheriffs, at the time of their going out of office." That therefore the rule ought to have been upon the old sheriffs to bring in the body; upon shewing cause it was contended, that the new sheriffs having made the indorsement upon the writ, as before stated, they had made themselves answerable for the body; but the court held, "That the indorsement merely shewed how the writ came into the hands of the present sheriffs, and therefore set aside the attachment." Mich. Term 24 G. 3. *Leigh* gent. one, &c. v. *Turner*, Imp. C. B. 184.

Observations on the *distringas*.

As the process of *distringas*, notwithstanding the above rule, may, perhaps, be sometimes resorted to, a few

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few observations thereon cannot be deemed wholly useless.

The writ of distringas must always lie four days in the sheriff's office; the teste and return, therefore, should agree therewith; so that the return should never be made till four days after the expiration of the rule to *return the writ*. Suppose, therefore, such rule was obtained the first day of Michaelmas term, November 6, it expires (being a four-day rule) on the 10th; on that day sheriff returns cepi corpus; you then sue out the distringas, which may be tested on the 6th November, and be returnable on the 14th, (eight days after,) viz. four days after the expiration of the rule; it should be put immediately into sheriff's office, and lay there the four days; otherwise time will be lost, as it must always lie there four days; though not necessarily four days before the return, since it may be put in on the return-day, and lay four days from that time.

How long it must lie in the office.

The nature of the distringas, and how it is rendered effectual by the application of the issues levied, is sufficiently explained by the following case:

This was the case of a sheriff who did not bring in the body after a return of a "cepi corpus" made by his predecessor; for which neglect, or refusal, several writs of distringas had issued against this *succeeding* sheriff. For the practice is, that if a sheriff, in office, returns a cepi corpus, and will not bring in the body, though he remains in office, an attachment shall go against him; but if he is gone out of office, an attachment shall not issue against his successor, the new sheriff, who did not make the return of cepi corpus; but a distringas is the method of enforcing him to bring in the body. And this latter was the present case, viz. that these writs of distringas had issued against the succeeding sheriff for not bringing in the body upon a cepi corpus, returned by a former sheriff, since gone out of office; and the court was applied to on behalf of the plaintiff, that they would direct the issues to be sold, and that the plaintiff should be paid his costs out of the money arising thereby.

In what way the issues levied thereon to be applied.

It

Of proceeding against the Sheriff, &c.

It was contended, on behalf of the sheriff, against whom these writs of distringas had issued, that the act of parliament of 10 G. 3. c. 50. does not extend to writs of distringas in general, but only to such writs of distringas as are issued against members of parliament, or relate to privilege of parliament; and this, chiefly, by reason of the title and the preamble of this act; the former is, "for the further preventing delays of justice by reason of privilege of parliament." The latter is also in express terms, confined to the inconveniences arising from the delay of "suits by reason of privilege of parliament."

But lord Mansfield held, that this act of parliament relates to all writs of distringas in general, and is not confined to such as concern privilege of parliament only.

The court ordered the issues to be sold, and the costs hitherto incurred by the fault of the sheriff to be taxed, and paid to the plaintiff out of the money arising thereby, and the residue to be retained in order to answer the event of the suit. *Raban v. Plaistow*, Bur. 2726.

CHAP. V.

Of the Mode of proceeding by Special Original in B. R. and by original Quare Clausum fregit in C., B. from the Commencement of the Suit to the Declaration.

IN the first chapter of this work there were four several ways pointed out of bringing actions in the courts of King's Bench and Common Pleas, in all common cases; namely, by *bill*, and by *special original*, in the former court; and in the latter, by *original* and *capias*, and by *original quare clausum fregit* and *summons*.

The different ways of bringing actions.

Having already shewn the mode of proceeding by *bill* in the King's Bench, and by *capias* in the Common Pleas, (which are the most usual ways of bringing actions,) from the commencement of the cause until defendant is brought into court, it only remains to consider in what manner the appearance of defendant is to be effected, when the proceedings are by *special original* in the one court, or by *original quare clausum fregit* and *summons* in the other.

There are few things relating to the practice of the courts more apt to confound and perplex the student, or practitioner, than the doctrine of writs; and as the mode of proceeding, either by *special original* in the King's Bench, or by *original quare clausum fregit* in the Common Pleas, is (comparatively speaking) but seldom resorted to, so it is, for the most part, but little understood. We have already endeavoured to give the reader a general idea of its origin and meaning in the first chapter of this work; and for further information thereon, we refer him to Appendix C. intending, in this place, merely to treat of the *practice* relating thereto, uninterrupted by any digression.

[Appendix C.]

SECTION I.

Of the Mode of proceeding by Special Original, in B. R.

Upon suing out original writs, a *fine* is paid to the curiātor, proportionable to the debt or damages mentioned

Fine paid on suing out originals.

tioned in the præcipe; (for the reason of this fine, see Appendix B.;) the damages should therefore be laid at as moderate a sum as can be done with safety and propriety. If the debt or damages be under 40*l.* nothing is paid. If,

	<i>l.</i>	<i>s.</i>	<i>d.</i>
From 40 pounds to 100 marks (<i>i. e.</i> 66 <i>l.</i> 13 <i>s.</i>)	0	6	8
From 100 marks to 100 pounds - - -	0	10	0
From 100 pounds to 200 marks - - -	0	13	4
From 133 <i>l.</i> 6 <i>s.</i> 8 <i>d.</i> to 166 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i> - - -	0	16	8
From 166 <i>l.</i> 13 <i>s.</i> 4 <i>d.</i> to 200 <i>l.</i> - - -	1	0	0
And for every 100 marks more - - -	0	6	8
And for every 100 pounds more - - -	0	10	0

How to proceed.

Make out a præcipe (a) on unstamped paper, which, if it be an action on the case, must recite the whole cause of action particularly; carry it to filazer (Mr. Adams), who will make out the original (a) and the capias (a). For the sake of expedition, you may first prepare capias yourself, reciting the whole cause of action therein, as in præcipe; pay filazer, for first count in præcipe, 2*s.* 6*d.*; 1*s.* for every other; the same for the counts in capias; making in all 5*s.* for first count in capias, and 1*s.* for every other; pay also 4*d.* for signing original writ; get capias sealed, pay 7*d.* Affidavit of debt to be first made, and memorandum of warrant procured, as in other cases.

If defendant to be arrested.

If you mean to arrest defendant thereon, carry capias to proper sheriff's office; for warrant pay 2*s.* 4*d.*

If only to be served.

But if defendant is only to be served therewith, subscribe the common notice for appearance, taking care, instead of the words—“at Westminster,” to say “wheresoever we shall then be in England.” See *ante*, ch. 3. sec. 1. C.

Of the alias and capias writs.

If not taken on, or served with capias, before the return thereof, an alias and pluries may be sued out; and if defendant is not to be found in the county where capias issued, sue out a testatum capias (b); or it may be sued out in the first instance, without suing out any capias; but as it ought to be made out to warrant the testatum, the filazer must be paid for it.

Of defendant's appearance if not held to bail.

If the defendant is not held to special bail, he must enter his appearance in eight days after the return of the capias, alias, or pluries, according as the writ may be with which he is served, and not eight days after the quarto die post of such return. It

(a) See the form of præcipe, original, and capias, &c. at the end of the vol. Appendix L.

(b) For the forms of these writs, which are the same as in other cases, see Appendix L.

must be filed with the filazer; pay 2s. 6d.; file, at the same time, the memorandum, or minute of your warrant to defend.

If defendant does not duly appear, plaintiff may enter an appearance for him, according to the statute, on affidavit of the service of the writ, and stating therein the kind of writ, and when and where returnable, with which he was served (c). Plaintiff may appear for him.

But if the defendant be held to special bail, he must put in bail before a judge, within four days after the *quarto die post* of the return of the writ, if the arrest were in London or Middlesex; and *six* days if in any other county. But if the last day be a Sunday, he has all the next day to put bail in. Of putting in special bail.

Bail must be put in in the county where the capias issues. Where bail must be put in.

As to the mode of putting in bail, excepting thereto, adding, justifying, and the like, it is the same as in common pleas in otherailable actions; see ante, ch. 4. sec. 5. The proceedings are with the filazer; but the fees are somewhat more. How to put in, except to, and perfect bail.

So also the proceedings against the sheriff to rule him to return the writ or bring in the body, are similar to those stated in the last section of the last chapter. How to rule the sheriff, &c.

Observations on the above Mode of Proceeding.

The usual mode of proceeding in the court of King's Bench is by bill; but in particular cases it may be *expedient*, and it is sometimes even *necessary*, to sue by special original. It is often expedient, and sometimes necessary, to sue by original.

It is *expedient* to proceed by original when the plaintiff expects defendant to be litigious, and to delay execution by writ of error; because, when proceedings in B. R. are by *original*, the writ of error must, in the first instance, be made returnable in the *House of Lords*, which, from the immediate expence occasioned thereby, is often a check to such a step being taken; whereas, upon pro- When expedient.

(c) For the form thereof, see Appendix L.

Q

cefs

cess by *bill*, error lies immediately from the King's Bench to the *Exchequer Chamber*, and afterwards to the House of Lords.

When necessary,

It is *necessary* to proceed by *original* when there are two or more defendants, and any or either of them cannot be found so as to be arrested or served with process; because, in such case, plaintiff cannot declare against those defendants who have been duly served or arrested, until he has *outlawed* the others; and process of outlawry only lies upon proceedings by original. See ante, ch. 3, sec. 2. A. 5.

When such defendants have been regularly outlawed, and plaintiff declares, such outlawry must be suggested in the declaration.

Debt must amount to 10l.

To enable any party to proceed by special original, the debt must amount to 10l. Stat. 5 Geo. 2. c. 27.

In what actions plaintiff may sue by special original.

It was formerly doubted whether proceedings by original in B. R. could be had in debt or covenant; but I conceive that no such doubt can at this day be entertained, but that all personal actions, founded on *contract*, may be sued in this court either by bill or original.

The reason of proceedings by bill being preferred.

The reason of the former mode being adopted is, because it is not only less expensive in the course of the proceedings, but also because a fine, proportionable to the amount of plaintiff's demand, must, in the first instance, as above shewn, be paid to the King on process by original.

How process by original must be returnable.

All proceedings on special original must be before the king himself, wheresoever he shall be in England. All writs, notices, &c. used in the course of the cause, from the first to the last, as writs of inquiry, venire, distringas, &c. must be made returnable on a general return day wheresoever, &c. and not "at Westminster," as in proceedings by bill. See ante, Introductory Observations, B. 3.

Original writ, whence it issues.

The original writ itself issues out of Chancery, and should be tested in the King's name, at Westminster, or wherever the Chancery is holden. 3 Blac. Com. 274.

It may be tested at any time, even in vacation; because it is presumed, that the court of Chancery is always open. *Whitehead v. Buckland*, Sty. 402. *Chaney v. Butter*, 3 Keb. 213.

How tested.

But the teste must be after the cause of action accrued, otherwise the writ is abateable. *Jones, one, &c. v. Burnet*, cited. 2 Bur. 967.

Teste must be after cause of action.

There should be 15 days between the teste and return; and, strictly speaking, the *capias* should not bear teste until the *quarto die post* of the return of the original, and there should be then 15 days between its teste and return; and this indeed must be observed, if the plaintiff proceeds to outlawry; but otherwise, both the original and *capias* may be made returnable the same day. There seems no specific time limited for the return of the original, though it is generally made returnable the same term, or the next to that in which it was issued; but if not returnable for two or three terms it does not vitiate, for it is no detriment to the defendant. *Dyer*, 175.

Must be 15 days between teste and return.

No limited time for its return.

The teste of the *alias capias* should be the *quarto die post* of the return of the *capias*; teste of *pluries* the *quarto die post* of the return of *alias*, and so on; and there should always be 15 days between the teste and return of each writ. See ante, ch. 3. sec. 1. E. 6.

How the alias, &c. must be tested.

By the stat. 16 Car. 1. c. 6. s. 7. the morrow of the Ascension is a good return, although there be not 15 days between the fourth day of the said return and the *quoin* day of the morrow of the Holy Trinity.

Morrow of Ascension a good return.

But if the cause of action accrued in the vacation, and the teste of the *capias* was the last day of the preceding term, and so, *apparently*, sued out before the cause of action, yet it is regular; for in such case, the actual day of suing out the writ is to be attended to. See ante, chap. 3. sec. 1. E. 8.

Capias may bear teste last day of term, though action accrued in vacation.

Sometimes, for the sake of expedition, in proceeding to outlawry, if the instructions be carried to the curfitor within the first week of a term, and the cause of action will admit of it, (*i. e.* if it accrued early enough, for it must have accrued before the teste of the original,) he

Sometimes original will be antedated.

he will make the original returnable on the first, or any other return of the preceding term. Tid. 14.

If defendant not held to bail, he must be served with copy of *capias*, not of original.

If the defendant is not held to bail, he must be served with a copy of the *capias* and not of the *original*. For the process, to be served according to the statute, must be process against the person. *Peter v. Reignier*, Bar. 410. See ante, ch. 3. sec. c. A. 1.

With a notice to appear.

There should be also subscribed a notice to appear "on a general return, wheresoever, &c." See ante, ch. 3. sec. 1. C.

Such is the mode of proceeding in order to bring the defendant into court by special original. We have before shewn how to effect his appearance by bill and *capias*. As the future proceedings, whether by bill or original, vary but little, we shall from henceforth consider them together; pointing out, in the progress of the work, such differences as may exist between them, contenting ourselves, at present, with observing,

Plaintiff must recover 50l. to entitle him to full costs,

except in certain cases,

If he wishes to amend his declaration, or original writ, how he may do it,

First, that although the expences of proceeding by special original are heavy, yet unless the plaintiff recover 50l. or upwards, he shall not, on taxing costs, be allowed any more or other costs than he would be entitled to in case he had proceeded by bill (except in such actions in which he could not proceed by bill, or in which any defendant shall be actually outlawed). And, secondly, That if plaintiff should find that the damages laid in the original are not sufficient to cover his demand, he may apply by summons, in the same way as in proceedings by bill, to amend his declaration; and afterwards, should judgment go by default, and a writ of error be brought, which would render it necessary to make the original correspond with the declaration, he may petition the master of the rolls, that the curfitor may be directed to amend the original accordingly; which petition is entitled in the cause, and is engrossed on a treble 6d. stamp. It is taken to the secretary's office in the Rolls, where 5s. 6d. is paid; and when answered, it is then taken to the curfitor, with the original, to be altered and re-sealed.

Want of original no error after verdict.

N. B. This is only necessary where error is brought after judgment by default; for if it be after verdict, the original

original need not be altered, as the want of an original cannot, in such a case, be assigned for error.

SECTION II.

Of the Mode of proceeding by Original Quare Clausum Fregit and Summons in C. B.

The original quare clausum fregit here mentioned, is precisely the same kind of writ as that on which the proceedings by *capias* are founded; the only difference is in the *process* which issues upon that writ, instead of its being by *capias* and *alias*, and the like, which is *process* against the *person*; it is by *summons* and *distringas*, which is the *process* against the defendant's *goods*.

The meaning thereof.

Formerly, except in few cases, this was the only mode of compelling the defendant's appearance in civil actions, his person not being liable to an arrest. But the writ of *capias* being gradually introduced, and at length generally allowed, and being deemed the most effectual and preferable mode of proceeding, the *process* by *summons* and *distringas* fell almost into disuse.

It is, however, by no means taken away; and is in some cases preferable to the *capias*; namely, where the defendant cannot be met with to be arrested or served with *process*, at least without great delay and difficulty, and yet has goods that may be distrained; for in this case, *personal* service of the *summons* is not necessary; but it is sufficient for it to be left at defendant's house by the sheriff's officer, and the writ to be returned—*Notice to the defendant*; and if he does not duly appear upon the appearance day of the return, the *distringas* issues, and afterwards an *alias*, and so on, till he does appear, or until sufficient goods have been distrained and levied to answer plaintiff's demand.

The mode of proceeding is as follows:

How to proceed.

Prepare memorandum, or minute of warrant to prosecute, as in other cases. See Introductory Observations, D. 3. Make out *præcipe* for the *curfitor* of the county where defendant has goods.

Memorandum of warrant.

Middlesex, ss. Original quare clausum fregit for A. B. against C. D. late of Westminster, mercer. Trespass at Westminster, returnable before his Majesty's justices at Westminster, on the morrow of All Souls.
T. S. attorney.

Præcipe for curfitor.

Take

How to get original writ and summons.

Take *præcipe* and memorandum of warrant to curfitor, who will furnish you with original signed and sealed; pay 4s. 6d. Go to proper sheriff's office for a summons; pay 2s. 4d.; give it to the officer you usually employ; pay him, for summoning each defendant, 5s.

When and how defendant should appear.

Upon the appearance day of the return of the writ defendant should appear, which is done by entering appearance with the filazer of that county where writ was issued, and at the same time delivering memorandum of warrant to defend. The *præcipe* for appearance is—

Præcipe for appearance.

Middlesex, ss. Appearance for G. D. late of Westminster, mercer, at the suit of A. B. to an original quare, and returnable on the morrow of All Souls.

P. R. attorney.

If defendant does not appear, how to proceed by distringas.

If defendant does not appear, (which you may know by searching at the filazer's, and no appearance being entered,) apply to the sheriff to return the original, which file with the custos brevium; pay 4d.; he will give you an abstract thereof on a slip of paper; carry it to the filazer; pay 6d. If notice to defendant be returned on writ, make out distringas on a half-crown stamp parchment, and a *præcipe* for the office; pay filazer for signing it, 2s. 6d.; seal, 7d.; go with it to the sheriff's office; get a warrant thereon to distrain defendant's goods to 40s.; give it to the sheriff's officer you employ; pay him 10s. for levying. On the return of distringas, which you may get returned at the office, sue out an *alias* in the same way; and then, if defendant has not appeared, move to increase the issues, either in court or in the Treasury Chamber. The court, on the *alias* distringas, will grant a rule to levy in proportion to the amount of plaintiff's debt, for it is at their discretion; sometimes, even to 40 or 50l. Carry the rule, with the *alias* writ, to sheriff. If not sufficient levied thereon, and defendant does not appear, sue out a *pluries*, and move, as before, for a further increase of issues, which the court will now grant to the amount of the debt and costs; carry rule, as before, with *pluries* writ, to the sheriff, who will make out his warrant accordingly. When the levy has been made, get *pluries* writ returned; and if defendant has not appeared, move to sell the issues, and apply them to payment of defendant's debt and costs, pursuant to statute 10 Geo. 3. c. 50.

By alias distringas.

How to increase issues.

Pluries distringas.

How to apply the issues.

If defendant should have appeared at any time after the passing of the distringas's, and before a rule obtained to sell the issues; then move the court, under the 10 G. 3. c. 50. to sell so much of the issues as will be sufficient to pay plaintiff his costs incurred by reason of such distringas, and *alias* distringas, or as the case may be.

Motion in court upon 10 G. 3. c. 50.

The act of 10 Geo. 3. c. 50. extends to all writs of distringas in general; though, by the preamble of the statute, it seems only to refer to such as issue against members of parliament. *Raban v. Plaiflow*, Bur. 2726.

That act extends to all writs of distringas.

The return day of a *clausum fregit*, and the *quarto die post*, are both reckoned *inclusively*; nor is there any difference whether the return day be on Sunday, or any other day.

When defendant must appear, and how the days are reckoned.

The defendant was served with a *clausum fregit*, returnable in four weeks from Easter-day; the return was Sunday April 20th; the defendant not appearing on the Wednesday following, the plaintiff, on the Thursday, sued out a *distringas*; on that day the defendant entered an appearance. On Friday morning the plaintiff's attorney levied 40s. under the distringas, on the defendant's goods.

Kerby, serjeant, obtained a rule to shew cause, why these issues should not be repaid to the defendant, with costs, on the ground, that the return day being Sunday, the defendant had till Thursday to appear, and as the distringas issued on that day it was irregular.

To this it was answered, that by the uniform practice of the court, the defendant was bound to appear *within four days of the return of the writ*, which are *inclusive* both of the return day and the *quarto die post*, and that Sunday was to be considered like any other return day.

The court, after consulting the secondaries as to the practice, were of opinion against the defendant. Rule discharged. *Fano v. Coken*, C. P. T. R. 9.

After appearance, plaintiff may declare upon this process, in any county (though different from the writ) and in any cause of action; and may, after judgment, if necessary,

necessary, purchase a *special original*, to warrant the proceedings.

☞ Having now shewn the mode of bringing defendant into court, in all common cases, whether the action beailable or notailable, and whether the proceedings be in the usual way, by bill in the King's Bench, and capias in the Common Pleas, or by special original in the former court, and original quare clausum fregit and summons in the latter; the next step to be taken is, to set forth the plaintiff's charge or cause of action against defendant, fully and particularly, in the DECLARATION. And as, from this period of the suit, in all the above cases, the proceedings which hitherto have been widely different, and therefore separately considered, are nearly similar, they will hereafter be treated of under one head.

END OF THE FIRST PART.

Ch. V.
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THE
PRACTICE
OF THE
COURTS

OF
King's Bench and Common Pleas.

PART II.

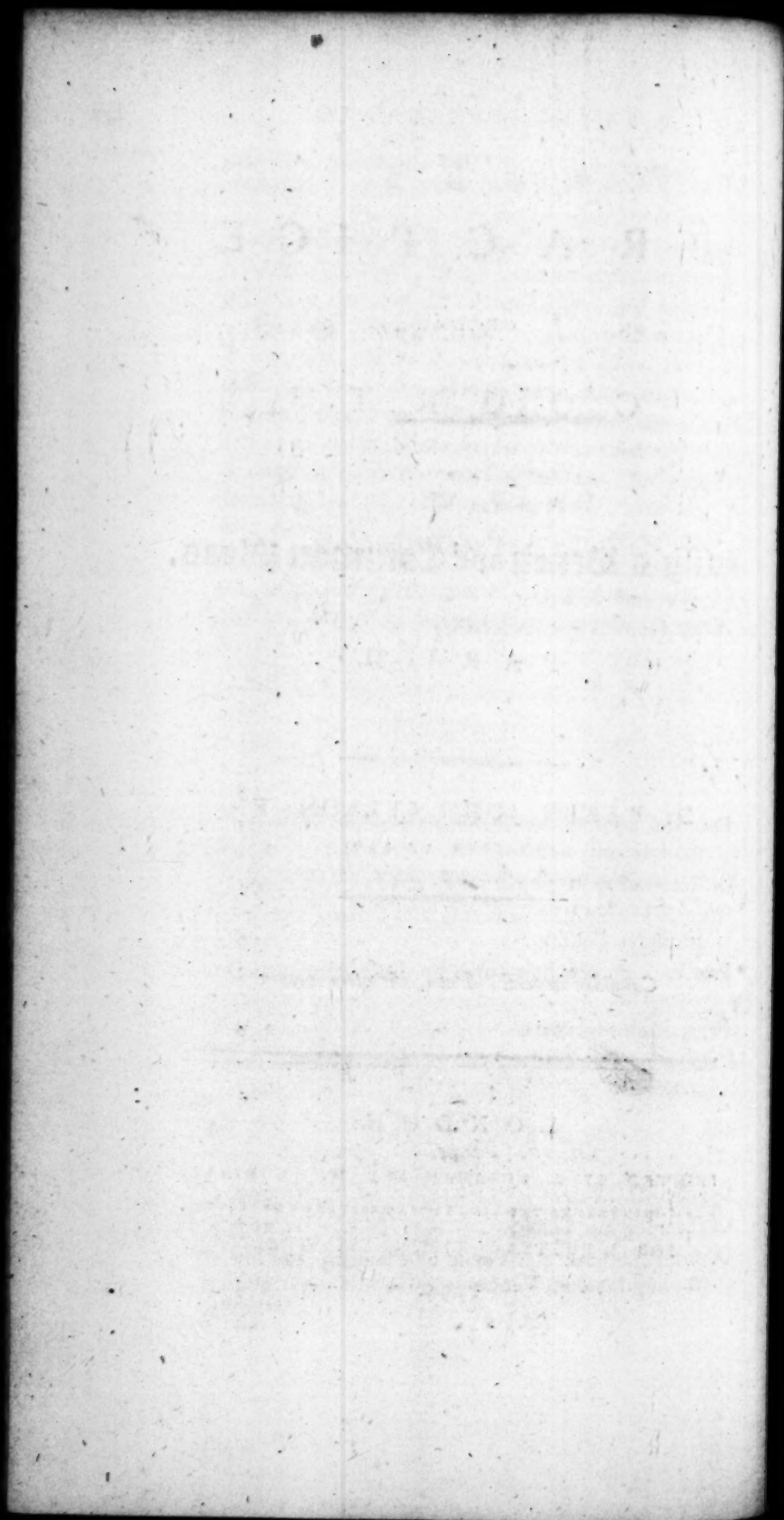
By BAKER JOHN SELLON, Esq.
BARRISTER AT LAW.

Candidus imperti; si non, his utere mecum.

LONDON:

PRINTED BY A. STRAHAN AND W. WOODFALL,
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FOR J. BUTTERWORTH, FLEET-STREET.

1794.



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O F T H E

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C H A P. VI.

Of the Declaration and its Incidents.

SEC. 1. *Of the Declaration.*SEC. 2. *Of the Venue.*

SECTION I.

Of the Declaration.

THE defendant having appeared in court, it becomes now the plaintiff's duty to bring forward the particular charge which he has to alledge against him; and this is done by counting or declaring against the defendant: the declaration or count being nothing more than a statement in writing of the cause of complaint which plaintiff hath against the defendant, setting forth, with a degree of accuracy, the time and place when and where, and the manner in which this cause of complaint arose, together with the damage or injury sustained by plaintiff in consequence thereof. After the declaration follow the pleadings between the parties.

Declaration,
what.

The declaration and pleadings were formerly made and carried on at the bar of the court [See *Appendix L.*] [Appendix L.]
are *tenus*, but are now transmitted to paper, and delivered to the parties.

Lest the defendant should be subject to the caprice or negligence of his adversary, the courts have fixed a certain limited time within which plaintiff must declare, or, in default thereof, judgment of *nonpross* may be given against him.

When to declare.

The time in which plaintiff must declare is,

Time of declaring.

In B. R.

In C. B.

Before the end of the term next
suing the return of the process,
defendant may sign judgment
of

Same as in *B. R.* only the de-
fendant must, at the end of such
ensuing term after return of
process,
R

Of the Declaration.

of nonpros. And this in all cases, (except replevin,) without having given any rule to declare. 13 Car. 2. ff. 2. c. 2. f. 3.

process, or in 4 days afterwards, give plaintiff a rule to declare, and cannot sign nonpros until that rule is expired: for if no such rule be given, plaintiff in this court has till the effoin day of the third term to declare in. R. Hil. 9 Ann. Stewart v. Harding, P. R. 121.

See further on this head, post, Observations, A.

Of the different Ways of declaring.

Explanation of the different ways of declaring.

Of declaring in chief.

Of declaring *de bene esse*.

Formerly, when the pleadings between the parties were carried on *ore tenus* at the bar of the court, plaintiff could not declare until defendant had actually appeared in court. So indeed for a long time after the introduction of the practice of declaring and pleading by attorney, no declaration could be delivered till the defendant was brought into court; that is to say, until common bail was filed, or appearance entered in actions not bailable, or special bail put in and perfected in bailable actions. The only way, therefore, of declaring at that time was, declaring, as it is termed, *in chief*. But for the sake of expediting justice, it was afterwards ordered by rules of court, that plaintiff might declare immediately upon the return of the process, without waiting for defendant's appearance, which was called declaring *de bene esse*, or *conditionally*; that is to say, *conditionally* until defendant had put in and perfected bail, if the action were bailable, or until he had filed common bail, or entered an appearance, if the action were not bailable.

The only two ways where process has issued.

There are therefore now two ways of declaring, namely, *in chief* and *de bene esse*, in all actions founded upon process already issued against the defendant.

Of declaring by the bye.

But there is further a third way of declaring in actions wherein no process has issued, and this is called declaring *by the bye*, which can only be done when the defendant is actually in court; for he is not till then supposed to be in custody: and this mode of declaring

Of the Declaration,

is grounded upon the principle of the defendant being already in custody, and therefore no occasion for any fresh process to warrant the declaration. Meaning thereof.

In whichever way the plaintiff declares, the declaration must be either *delivered* or *filed*, according to the circumstances of the case. Declarations must be delivered or filed.

We shall therefore proceed briefly to shew the practice in each of the above ways of declaring.

Of declaring in chief.

Declaring in chief is, when plaintiff declares after the defendant has appeared; and this may be either when defendant has himself appeared, or when plaintiff has appeared for him according to the statute. What.

How, if defendant has appeared.

B. R.

In every cause in which special or common bail shall be filed, and notice thereof given to the attorney for the plaintiff, a copy of the declaration shall be delivered to the defendant's attorney, who shall pay for the same according to the usual rate; but if the attorney for the defendant, or his clerk in his absence, refuses to pay for such copy; or if it shall happen that the abode of the defendant's attorney be unknown to the plaintiff's attorney, then it shall be lawful to leave such copy with the officer of this court appointed for affiling declarations, and notice thereof shall, without delay, be given to such defendant or his attorney; and such declaration shall be held well delivered from the time of such notice only. *R. Trin. 2 Geo. 2.*

C. B.

If the defendant's attorney has appeared or put in bail, the declaration must be delivered to him; whereupon he must pay for the same duty and warrant; or on refusal by him, or his clerk in his absence, or if his abode be unknown, it may be filed in the Prothonotary's office on payment of 2s. a count, or 8d. per sheet; and then, on notice thereof to the defendant or his attorney, (and from the time of giving such notice, and not before, declaration is well delivered,) and on rule to plead being given, judgment for want of plea may be signed, and no plea may be received till the declaration is taken out of the office. *R. T. 12 W. 3.*

Copy of declaration to be delivered to defendant's attorney.

Who is to pay for same.

If he refuses, or place of abode not known.

Copy may be filed in the office, and notice thereof given to defendant or his attorney.

Of the Declaration.

How, if plaintiff has appeared for defendant according to the statute.

Copy of declaration to be left at the office,

and notice given to defendant or his attorney,

or left at defendant's last place of abode.

What notice shall express.

In case defendant does not plead thereto, judgment may be signed.

Declaration well delivered from time of notice.

When judgment signed.

Notice of inquiry may be given to defendant, or left at his last place of abode, and held good,

In all causes, when a copy of the process is served upon any defendant or defendants, and an appearance is entered, or common bail filed for such defendant or defendants by the plaintiff's attorney pursuant to the statute, the plaintiff's attorney in such case shall leave a copy of the declaration in the office with the proper officer appointed for that purpose, and likewise give notice thereof to the defendant or defendants, by delivering an English notice, written in secretary hand, to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; in which notice shall be likewise expressed the nature of the action, and at whose suit prosecuted (a), and the times limited by the rules of this court for such defendant or defendants to plead to such action; and that in case such defendant or defendants do not plead to such declaration by such limited time so to be expressed in such notice, judgment will be entered against such defendant or defendants by default; and from the time of giving such notice as aforesaid, such declaration shall be deemed well delivered to such defendant or defendants, and not otherwise.

And in case such defendant or defendants, after such notice given, do not plead by the time the rules for pleading are out, the plaintiff may, in such case, sign his judgment (b) without any oyer or further calling for a plea, and thereon give notice of executing his writ of inquiry, either by delivering a notice in writing to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; which shall be a sufficient notice to such defendant or defendants of the time of executing such writ of inquiry. R. Trin. 1 G. 2. B. R. Mich. 1 G. 2. C. B.

For further explanation of these rules, see post, Observations, C.

Of declaring de bene esse.

What.

When plaintiff declares after the return of the process, but before the defendant has appeared, it is called *declaring de bene esse*, or *conditionally*; that is to say, conditionally until defendant has filed common bail in B. R.

(a) In C. B. the rule says, the notice must signify in whose office such declaration is left.

(b) In C. B. the rule says, that a rule to plead must be first given. See R. Mich. 1 G. 2. C. B.

OF

Of the Declaration.

or entered an appearance in C. B. if the action be not bailable; or until he has put in and perfected bail, or (in case bail has been put in but not justified) until bail have justified; if the action be a bailable one.

The latest rules respecting this practice of declaring *de bene esse*, are the following:

B. R.

It is ordered, that upon all process to be issued out of this court returnable before the last return of any term, where no affidavit shall be made and filed of the cause of action, pursuant to the acts of parliament for preventing vexatious arrests, the plaintiff may file or deliver the declaration *de bene esse* at the return of such process, with notice to plead in eight days after the filing or delivery thereof; and if the defendant doth not file common bail and plead within the said eight days, the plaintiff, having filed common bail for such defendant according to the said act, may sign judgment for want of a plea; provided that such declaration be delivered or filed, and notice thereof given four days exclusive before the end of such term, and a rule to plead be duly entered. Rule Trinity term 22 Geo. 3.

C. B.

Upon process returnable the first, second, or third return of any term, the declaration may be delivered *de bene esse* at the return of the process, with notice to plead, if in London or Middlesex, (and defendant lives within 20 miles of London,) in four days: but if the plaintiff declares in any other county, then it may be delivered *de bene esse*, with notice to plead within eight days after declaration delivered, either where there is special or common bail filed. Rule Trin. 3 Geo. 3.

How in B. R. in actions not bailable.

How in C. B. in actions whether bailable or not.

Upon process to be issued and made returnable as aforesaid, where an affidavit shall be made and filed of the cause of action pursuant to the said act, the declaration may be filed or delivered *de bene esse* at the return of such process, with notice to plead in four days after such filing or delivery, if the action

How in B. R. in actions bailable.

Of the Declaration.

action be laid in London or Middlesex, and the defendant lives within 20 miles of London, and in eight days if the action is laid in any other county, or the defendant lives above 20 miles from London; and if the defendant puts in bail, and doth not plead within such times as are respectively before mentioned, judgment may be signed: provided that such declaration be delivered or filed, and notice thereof given four days exclusive before the end of such term, and a rule to plead be duly entered. Rule Trinity term 22 Geo. 3.

For an explanation of these rules, see post, Observations, B 2.

As to the manner of *delivering and filing* the declaration *de bene esse*, it is the same as in declaring in chief.

Of declaring by the bye.

A declaration by the bye is not grounded on any original writ or process, but upon the defendant's being already in court at the suit either of plaintiff himself or some other person; and therefore it is presumed unnecessary to sue out any other process against him. With respect to the practice relative to this mode of declaring, it is the same as declaring in chief: the only thing necessary to be known is, in what cases declarations by the bye are allowable; for which see post, B 3.

How declaration to be ingrossed, charged for, and indorsed.

Declaration should be ingrossed on treble penny stamped paper;—charge ingrossing 4d. per sheet (72 words making a sheet) beside duty, but nothing for paper; charge warrant to defend.

Of the Declaration.

In B. R.

In all actions, 4d. 1 and for
filing common bail according to
statute, 7s. 2d.

In C. B.

In debt, detinue, and tres-
pass, 4d. 1 in other actions, 8d. 1
and for entering appearance: ac-
cording to statute, 3s. 10d. 1 if
at suit of attorney, 7s. 2d.

Besides which, you should indorse on declaration the
time for defendant to plead thereto; and if the declara-
tion be filed or delivered *de bene esse*, it should be indorsed
accordingly; as thus, if plaintiff declare in chief:

*The defendant is to plead hereto in four (or eight days, or
within the first four days of next Michaelmas term, as the case may
be,) otherwise judgment.*

Form of indorse-
ment, if decla-
ration be in
chief.

If plaintiff declare *de bene esse*, thus:

*This declaration is filed (or delivered, as the case may be.)
conditionally until common bail be filed, (or an appearance entered,
or bail above be put in and perfected, as the case may be) and
defendant is to plead hereto in four days, (or eight days, or as
the case may be,) otherwise judgment.*

If declaration be
de bene esse.

But this indorsement is not necessary when the de-
claration is filed in the office, because in that case a no-
tice must be given to the defendant, or left at his last
usual place of abode; which notice must express the na-
ture of the action, at whose suit, and the time allowed
for pleading, as follows:

Indorsement not
necessary if de-
claration be
filed, but no-
tice must be
given.

Form of Notice of Declaration.

*Take notice, that a declaration was this day filed with the
clerk of the declarations in the King's Bench office, in the Inner
Temple, London, (if in B. R.; or with the Prothonotaries at
their office in Tanfield-court, in the Temple, London, if in
C. B.) conditionally until special bail is put in and perfected, (or
until common bail be filed, or until common appearance be
entered, as the case may be,) as of this present Michaelmas
term, against you, at the suit of the above named plaintiff, in an
action of trespass on the case on several promises, to the plaintiff's
damage of 100l. 1 and unless you plead thereto in four days (or as
the case may be) from the date hereof, judgment will be signed
against you by default. Dated the 28th day of January 1794.*

Form of notice
of declaration.

Yours, &c.

J. S. Attorney for plaintiff.

To Mr. C. D. the above defendant.

R 4

IF

Of the Declaration.

If declaration be filed in chief, then the notice is as above, only omitting the words "*conditionally until bail be put in and perfected.*"

For further remarks hereon, see post, Observations, D.

Of the Time allowed for pleading.

As the time wherein defendant is to plead must be accurately indorsed on the declaration, or inserted in the notice, it is extremely material that plaintiff should be well acquainted therewith.

How, if plaintiff declare in chief in both courts.

Whenever declaration is delivered or filed in *chief*, defendant is to plead in four days from the delivery thereof; provided the venue be in London or Middlesex, and the defendant lives within 20 miles of London. But if the venue be not in London or Middlesex, or if the defendant does not live within 20 miles of London, then he is to plead in eight days, and this in both courts, whether the action be bailable or not.

How, if plaintiff declare *de bene esse* in B. R.

How in C. B.

But whenever the declaration is delivered or filed *de bene esse*, the time of pleading is different in the two courts; for in K. B. if the action be *not* bailable, it is *always* eight days; but if it be bailable, then four or eight, according to the above rule. But in C. B. no such distinction prevails, but whether the action be bailable or not, the time for pleading is four or eight days, the same as when plaintiff declares in chief.

How, if defendant be entitled to an imparlance.

It is however to be remembered, that in both courts, and in all cases, if the declaration be not delivered, or notice given four days exclusive before the end of the term, defendant is entitled to an imparlance; and therefore the time for pleading is within the first four days of the next term.

But see post, Ch. VII. Sec. VI. in what case defendant is entitled to imparlance.

Having thus endeavoured to render the practice clear and intelligible with respect to the *time* of declaring, the

Of the Declaration.

manner of declaring, the mode of delivering and filing declarations, and of ingrossing, charging for, and indorsing them, we proceed, by way of further illustration of the subject, to point out the most material cases that have been decided on this part of the proceedings.

OBSERVATIONS UPON

A. The Time of declaring.

B. The different Ways of declaring.

1. *In chief.*

2. *De bene esse.*

3. *By the bye.*

C. The Filing and Delivery of Declarations.

D. The Notice of Declaration, and paying for same.

E. Declaring against two Defendants when one only has appeared.

F. The Declaration varying from Process.

G. The consolidating of Declarations, and striking out superfluous Counts.

H. Defects in Process cured by Declaration or otherwise.

I. The Rule to declare.

K. Of intitling Declarations, and of special Memorandums.

A. Of the Time of declaring.

B.

By the general rule of law a plaintiff must declare within twelve months after the return of the writ, or he will be out of court. But by the rules of the courts, if he do not deliver his declaration within two terms, defendant may sign judgment of *nonpros*. If, however, no such judgment be signed, plaintiff may still deliver his declaration at any time within the year. *Worley v. Lee*, 2 D. & E. 112. *Penny v. Harvey*, 3 D. & E. 123. *Sherston v. Hugbes*, 5 D. & E. 36.

Within two terms;

or if no judgment, within the year.

It

Of the Declaration.

It was formerly held, that if a declaration were not delivered by the last day of the second term, that is, on or before the sitting of the court the last day, although defendant had not signed *nonpro*, yet that it was at his option to receive the declaration afterwards, nor could he be compelled so to do. *Barnes v. Geering*, 12 Mod. 217.

And still is it upon this ground that a new count cannot be added to a declaration after the second term, because that would be tantamount to a new declaration, and plaintiff could not declare after two terms. *Nybett v. Griffiths*, Bay. 97.

In *B. R.* plaintiff has only to the end of the second term to declare in, whether called upon by rule or not; but in *C. B.* he has till the assize day of the third term, if not called upon by rule. *P. R.* 121.

In both courts plaintiff has two terms to declare in after bail is complete.

But if there be a treaty between plaintiff and defendant, he is not obliged to declare within that time. *Walter v. Steward*, 3 Will. 455.

B.

B. The different Ways of declaring.

(B 1.)

(B 1.) *In chief.*

Of declaring in chief.

Declaring in chief being the regular way of proceeding after the appearance of defendant, there are no particular observations to be made thereon, saying the practical part, which is explained above, and the observations relative to declarations in general mentioned hereafter.

(B 2.)

(B 2.) *De bene esse.*

De bene esse,
when plaintiff
may so declare.

In the rule of *B. R. Trin. 22 Geo. 3.* concerning declarations *de bene esse*, the words are, "upon all process returnable before the last return of any term;" and in rule of *C. B. 8 Geo. 3.* the words are, "upon process returnable

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able the 1st, 2d, or 3d return of any term, *plaintiff may file or deliver declaration de bene esse*, with notice to plead, &c." From which words it has been understood, that no declaration could be filed or delivered *de bene esse*, except upon process returnable *before the last* return of the term. Thus in a late ingenious book of practice, "Upon process returnable *the last* return of the term, the declaration cannot be filed or delivered *de bene esse*;" and the rules of court are referred to in support of this doctrine. *Tidd*. 233. But with deference I conceive, that the operation of the above rules of court is not to confine declarations *de bene esse* to process returnable as therein mentioned, but only to regulate the time wherein defendant is to plead to such declarations on process so returnable. Plaintiff may declare *de bene esse* upon any process whenever returnable; but if it be not returnable before the last return of the term, the notice to plead must not be in four or eight days, as mentioned in the rules (since those rules do not extend to such declarations *de bene esse*.) but the defendant will, in that case, be entitled to an imparlance, and the notice should be to plead within the first four days of the next term. Agreeable to this is the determination in the case of *Abbey and Martin* in 1 C. B. T. R. 533, where on process returnable the last return of Trinity term, a declaration was filed *de bene esse*, with notice to plead within the first four days of Michaelmas term, and it was held regular. No reason indeed is given, but it is submitted, that it might have been upon the principle above mentioned, namely, that the rules of court only govern the time of pleading to declarations *de bene esse*, returnable before the last return, and do not mean to prevent plaintiffs declaring *de bene esse* upon any process returnable upon any subsequent return, provided the notice to plead be accordingly within the first four days of the following term.

Explanation of rule Trin. 22 Gen. 3. in B. R. and 8 G. 3. in C. B.

A declaration *de bene esse* must be filed or delivered before the defendant has appeared, and even before the time for his appearing or putting in bail is expired. *Fotherby v. Lloyd*, Bar. 342.

At what time.

For declaring after appearance is called declaring in chief.

Of the Declaration.

chief. And if plaintiff neglect to declare *de bene esse* before the time for defendant's appearance is out, he must first bring defendant into court by filing common bail, or entering an appearance for him according to the statute, and then declare against him in chief. *Smith v. Painter*, 2 D. & E. 749. That is, provided the action be not bailable; for if it be, plaintiff must then proceed against the sheriff; or upon the bail-bond.

How soon it
may be filed,
&c.

In *B. R.* the return day of the writ is the soonest that a declaration *de bene esse* can be filed or delivered; and where an original is returnable on the effoin day of term, a declaration cannot be delivered *de bene esse* till the first day of term. *Burgh v. Dixon*, 14 G. 2.

On return day.

On effoin day,
how far good.

But in *C. B.*, although declaration may be delivered *de bene esse* on the return day, and be good for many purposes, yet being in favour of plaintiff to expedite his cause, it cannot be delivered so as to charge defendant with paying for the declaration till the appearance day; for the four days of grace are allowed defendant to make an end of the cause by payment of the debt or otherwise; and if this practice were to be countenanced, an attorney might delay the service of the writ till the night before the return, and charge the defendant with the costs of declaration as well as process. *Golding v. Gray*, Blac. 750.

And in *B. R.* the master will not allow costs of declaration delivered under such unfair circumstances.

Time for plead-
ing how rec-
koned.

The eight days time when defendant is to plead reckons from the delivery of the declaration, be it sooner or later. *Shadwell v. Angel*, Burr. 55.

In *C. E.*

So in *C. B.* if a declaration is delivered *de bene esse* on the effoin day of the return, defendant is entitled to eight days time to plead, (though it be a case that would otherwise require only four;) if *after* the effoin day, and on or before the appearance day of the return of the writ, the defendant is entitled to four days *from* the appearance day; and if delivered after the appearance day, then to four days *after* delivery. Blac. 1243.

Where

Of the Declaration.

Although the delivery of a declaration *de bene esse* after the time expired for putting in bail is a bad delivery, yet it is not a waiver of exception to bail; but demanding a plea is; because the latter is admitting the defendant to be in court and in a condition to plead. *Lifter v. Wainbouse*, Bar. 92.

If declaration delivered too late, whether waiver of bail.

Where declaration is delivered *de bene esse* at the return of process, with notice for defendant to plead within eight days after such delivery, if the defendant do not file common bail and plead within such eight days, plaintiff may sign judgment for want of a plea, having first filed common bail for defendant, and a rule to plead having also been duly entered. *Shadwell v. Angel*, Burr. 55.

If defendant do not plead, &c. plaintiff may sign judgment.

Care should be taken to mark the declaration *de bene esse*, otherwise it will be irregular; and if delivered before special bail put in, it will be a waiver of the bail. *Evans v. Tillam*. Bar. 257. Imp. C. B. 4th Edit. 231.

(B 3.) *Of declaring by the bye.*

(B 3.)

It has been already observed, that declarations by the bye are not grounded on any original writ or process, but upon the defendant's being in court. Now there are three ways in which a defendant may be in court: 1st, He may be in the actual custody of the marshal as a prisoner: 2d, He may have voluntarily come into court at the suit of any person, by having himself filed common bail and the like: or, 3d, He may have been forced into court by plaintiff's having filed common bail, or entered an appearance for him according to the statute.

Declaring by the bye.

Now in the two first cases, by the practice of the King's Bench, any person may deliver or file declarations against him by the bye, provided they be delivered or filed within the same term that the process against defendant (upon which he is either so in custody, or to which he has so voluntarily appeared) is returnable. *Sulyard v. Harris*, Burr. 2180.

In B. R.

And

Of the Declaration.

And the plaintiff himself may declare by the bye against him at any time before the end of the next term after the return of the process. *Smith v. Muller*, 3 D. & E. 627.

But in the 3d case, where defendant has been forced into court, no other person except the plaintiff himself, can deliver a declaration by the bye against him. *R. Mich. 10 G. 2. Wallis v. Smith*, Caf. Tem. Hard. 207.

In C. B.

Such is the practice of the court of King's Bench: but that of the Common Pleas is otherwise; for there, in all cases, no person can declare by the bye, except the plaintiff himself; and he must do it within the same term in which the writ is returnable. *Methwin v. Pople*, Caf. Prac. C. B. 6. *Dunn v. Hutt*, Bar. 346.

Which rule also prevails in B. R. when the action is by original. Tidd. 217.

N. B. The reason of this difference in the practice of the courts seems to be, that in B. R. when defendant is actually in court, either by having filed common bail, or arrested and put in special bail, he is presumed to be in the custody of the marshal, ready to answer all declarations that may be brought against him by any person whatsoever; whereas in C. B. he is only in court *quoad* the plaintiff.

How in joint actions.

If a joint action be brought, either of the plaintiff's declaring severally by the bye, will be deemed as strangers, and can only do so in B. R., and that subject to the above rules. *Sulyard v. Harris*, Burr. 2181.

In actions by husband.

So in B. R. in an action at the suit of the baron only, a declaration may be delivered by the bye at the suit of himself and *feme*, and *vice versa*; but not so in C. B. *Reeks & Ux v. Robins*, Bar. 337.

By executor.

So in B. R. upon process with an *ac-etiam* at suit of plaintiff as executor or assignee, he may declare by the bye in his own right: but not so in C. B. unless it were a general *clausum fregit* without an *ac-etiam*.

But

Of the Declaration.

But in all cases where defendant comes in by rule of court and not by process, he is not compellable to receive a declaration by the bye; as where a person by rule of court is made defendant in ejectment and files common bail, and other similar cases. *Styles 47.*

How if defendant is in court by rule of court;

Where the action is by special original, either in *B. R.* or *C. B.*, plaintiff must first declare agreeable to that original, before he can deliver a declaration by the bye.

or if action be by special original;

If the action be bailable, but not by special original, as by bill of Middlesex or *latitat* in *B. R.*, or by a *quare clausum fregit* in *C. B.* with an *ac-etiam*, plaintiff may declare by the bye for a different cause of action, before he has declared in the original action; but in such case he will forfeit his bail; because in bailable actions, if the declaration differ from the writ, it incurs such forfeiture. *Holmes v. Small*, *Cal. Pr. C. B. 58.*

or be bailable or not.

But if the suit be not bailable, either plaintiff or a third person in *B. R.* may declare by the bye in any action he pleases; nor need such third person wait for the delivery of a declaration by the plaintiff in the writ. *Con. Philip's case*, 1 *Crom. 96.*

A declaration may be delivered by the bye even after the debt and costs of the first declaration are paid; provided it be delivered of the same term in which writ is returnable. *P. R. 144. Hand v. Willett.*

When delivered and the costs paid.

C. Of filing and delivering Declaration.

C.

The general rules which govern the filing or delivering of declarations have been already stated *ante p. 235.* the following are a few determinations tending further to explain them:

If the defendant's attorney be known, a copy of the declaration must be delivered to him; and if he be a country attorney, then it ought to be delivered to his agent in town: for if it be delivered to the defendant himself,

To whom delivered.

Of the Declaration.

himself, or left in the office, unless the attorney refused to pay for it, it will be a bad delivery. *P. R. 126. White v. Edwards. Ray. 1408. 8 Mod. 379.*

When filed.

But if the place of abode of defendant's attorney be not known, or if such attorney refuse to pay for declaration, then a copy must be filed in the proper office, but even then not left with defendant himself or at his house.

So if plaintiff files common bail, or enters appearance for defendant according to the statute.

If such defendant, for whom plaintiff so appears, be a practising attorney, he must not deliver declaration to him at his chambers, but must leave it in the office. *P. R. 128. Heber v. King.*

At what time.

A copy of declaration ought to be delivered or filed before nine in the evening, otherwise plaintiff will be entitled to an imparlance, and judgment, if signed, will be set aside. *P. R. 123. Bayly v. Dennis.*

Four days before end of term.

Declaration should be delivered four days exclusive before the end of the term, (i. e.) on the 8th, if term ends on the 12th, or defendant will be entitled to an imparlance. *P. R. 125. Porter v. Barnes.*

Not on Sunday.

Delivery of a declaration on a Sunday bad, though cases may be found to the contrary. *Walker v. Town, Bar. 300. Morgan and Johnson, C. B. T. R. 629.*

When declaration is delivered, a notice to plead should be indorsed thereon; but when it is filed it need not. Nor indeed is it absolutely necessary for the notice to plead to be given at the time declaration is, or indorsed on it; for if given afterwards, provided it be a due notice as to length of time, it will be good. *Ann. C. B. 2 Wil. 137.*

D.

D. The Notice of Declaration, and paying for same.

In all cases where declarations are left or filed at the office, a proper notice thereof must be given to defendant

Of the Declaration.

ant or his attorney; for if declaration be left in office, and notice given to defendant's attorney, it is tantamount to a delivery of it to him. *Thomas v. Bushell*, Cal. Prac. C. B. 84.

If not delivered to the attorney, it must be left at the last or usual place of abode of defendant. How served.

If neither the attorney nor the defendant's last place of abode can be found, application may be made to the court, that notice left at the office may be good, unless the bail, if any, shew cause to the contrary. *Miller v. Parsons*, Bar. 307.

Notice has been held good when put under the door of defendant's house, which was empty and shut up; court thinking it a trick of defendant's to avoid process. *Wood v. Dodgson*, Bar. 278.

But where it was merely put under the latch of defendant's door, without its appearing that the person who left the notice knocked or endeavoured to open the door, it was bad. *Talbot v. Oldham*, Bar. 411.

If the action be against two or more, notice must be given to all the defendants, or it will be bad. *Coulson v. Turnbull, & others*, Bar. 246. *Kingdon v. Horn & another*, Bar. 293.

It must be served before nine in the evening, and before rule to plead is given. P. R. 131. & 135. 121.

It must not be served on a Sunday. *Morgan v. Johnson*, C. B. T. R. 629.

This notice must be in writing. P. R. 130.

How made.

It ought to follow the process: so that where a person residing in *Dorchester*, took lodgings in *London* for three or four days, and was there served with process, although he immediately after went home into the country, notice of declaration left for him at his lodgings was held good. P. R. 129.

S

It

*Of the Declaration.***Its contents.**

It ought to specify technically the nature of the action, as trespass, trespass on the case upon promises, trespass on the case for tort, debt, covenant, and the like, or it will be insufficient, although, perhaps, it may describe the cause of action so as to be understood by common people.

As if it says that plaintiff declares on a note of hand; or that it is an action for work and labour done by plaintiff for defendant; though intelligible in common parlance, yet the notice is bad; because the nature of the action as debt or trespass on the case is not technically expressed. *Taylor v. Sherman*, Bar. 299. *Graves v. Wife*, 2 Wil. 84. *Bartholomew v. Golding*, Bar 291.

Nature of action.

It must shew the nature of the action with sufficient certainty; so that merely to say in an action on the case, without mentioning whether upon contract or for tort, is not sufficient. P. R. 131.

But it need only mention the nature of the action, for the declaration will shew the particulars. P. R. 133.

At whose suit.

It should further specify at whose suit prosecuted, and the time allowed for pleading thereto; and that unless defendant plead in that time, judgment will be signed.

Notice to plead in four days when defendant is entitled to eight, bad; and judgment set aside, though not signed till after the eight days. P. R. 135.

Dated.

So it should be properly dated; for it will be bad for want of a date. *Cromwell v. Goodwin*, Bar. 409. P. R. 134.

For if the notice be irregular, and plaintiff signs judgment for want of a plea, defendant may set it aside on motion for such irregularity. *Graves v. Wife*, 2 Wil. 84. Bar. 291.

When necessary in B. R., in C. B.

In B. R. this notice is necessary in all cases; but in C. B. it has been held, that notice of a declaration being left in the office, is not necessary in bailable actions, where

Of the Declaration.

where defendant's attorney has put in bail, for he ought to search for it; but in actions not bailable it is. P. R. 149. *Simmons v. Shannon*, Blac. 725.

Sed Q. and *vide Simmons & Shannon*, as reported 3 Wil. 147.

The declaration is only well delivered from the time of the notice; and is, therefore, to be considered as of that term in which notice was given. *Field v. Gooding*, 1 Barn. 46. How it operates on declaration.

Interlocutory judgment was set aside for defect of notice. In the term following (Michaelmas) plaintiff gave fresh notice, and forwant of plea signed judgment: which second judgment was set aside on the ground, that the declaration was only well delivered from the time of serving second notice; and that the writ being returnable in Easter, declaration was delivered too late, and plaintiff must begin again. *Bartholomew v. Goulding*, Bar. 291.

Formerly, therefore, when it was held, that plaintiff must declare before the end of the next term after return of process, or he would be out of court; although declaration was filed within that time, yet if the notice was not delivered until after such second term, though even before the esoin day of the third, it was held bad. *Pritchard & Lewis*, Bar. 304. Former practice.

Afterwards it was determined, that if the declaration were filed within the second term, notice given before the esoin day of the following term was good. *West & Radford*, Bur. 1452. How altered.

But the practice now is, that if the declaration be filed within the second term, notice of declaration served on the esoin day of the third, or indeed at any time within the 12 months from the return of writ, will be good, provided defendant has not signed judgment of *nonpros*; because plaintiff has all that time to declare in before he is out of court. *Worley & Lee*, 2 D. & E. 112. *Penny & Harvey*, 3 D. & E. 123. Present practice of serving notice as to time.

Of the Declaration.

Of paying for
declaration.

When declaration is delivered, defendant's attorney must pay for it; as also the 4*d.* for the warrant, as charged thereon: if he refuses to pay either, plaintiff cannot sign judgment (*Oneale v. Price*, 4 D. & E. 370.), but he must leave the declaration in the office, and proceed by giving a rule to plead, and demanding a plea, and for want of it, sign judgment; taking care not to receive a plea till the copy of declaration is paid for.

So where declaration is in the first instance filed, and notice thereof given, defendant must take it out of office and pay for it, before plaintiff is obliged to receive his plea; and though defendant appears and tenders a plea, yet plaintiff may sign judgment for want of declaration being taken out of office and paid for. 1 Wil. 173.

Formerly the declaration itself was delivered to defendant's attorney, who made a copy of it and returned it (*Tidd*, 229.): and I presume it was upon that practice being disused, that the obligation upon defendant to pay for a copy attached.

¶

¶ Declaring against two Defendants, when only one has appeared.

Of declaring
against two,
when one only
has appeared.

In both courts, and in all actions, whether bailable or not, if there be two defendants against whom plaintiff wishes to declare upon a joint contract or cause of action, and one only appears or puts in bail, plaintiff cannot declare until the other either appears or is outlawed.

But he cannot be outlawed unless the proceedings were by special original: so that it is sometimes useful to sue by original, when it is suspected that either of the defendants will not appear, or cannot be found.

In such case, therefore, plaintiff should apply to a judge for an order for time to declare against the defendant, (already in court,) until the other appears, or is arrested, and puts in bail, or is outlawed, as the case may be.

For

Of the Declaration.

For a declaration first delivered to one, and then; when the other appears, to the other, is irregular. *Knight v. Parker* and another, Blac. 759.

Where a *latitat* was against two, returnable in Michaelmas term, and one appearing, plaintiff filed declaration against him, and took out an *alias* returnable in Hilary term, in which *both* defendants were named, and then the other defendant appeared, and plaintiff filed a new declaration against both as of Michaelmas Term; the first was held to be void, and the second wrong dated. *Stork v. Herbert & Eyton*, 1 Wil. 242.

But the court refused to stay proceedings, saying, plaintiff might amend as it was but a mistake.

If one defendant has been outlawed and plaintiff declares against the other, it shall not be in the power of the latter, by pleading, to impeach the outlawry. *Symonds v. Parmiter*, Blac. 21.

On common procefs, where the action is not bailable, though four be put in a writ, if plaintiff has a separate cause of action against each, he may afterwards declare severally against one or more of them; but not so if the procefs be bailable. Different on common and bailable procefs.

If plaintiff has a joint and separate cause of action against the four, as where defendants are all bound in an obligation to him jointly and severally, he must declare either against them all jointly or against each severally, and cannot, if two or three appear, declare jointly against them only.

§. Of Declaration varying from Procefs.

§.

The chief distinction in cases of declaration varying from procefs is, whether the action be bailable or not. Of declaration varying from procefs.

If defendant be held to special bail, plaintiff must not declare for a different cause of action, or in a different capacity than mentioned in writ, otherwise bail will be See ante ch. 3. sec. 1. E. 3, 4, 5.

Of the Declaration.

be discharged, and court, on motion, will order a common appearance, *Hally v. Tipping*, 3 Wil. 61., as if the *ac etiam* writ was in his own right, and he afterwards declared as executor.—*Ib.*

So if plaintiff sues out a *quare clausum fregit* and declares in trover. *Turing v. Jones*, K. B. Mich. T. 34 Geo. 3.

But the court will not discharge defendant out of custody on filing common bail, on the ground of a variance between the declaration and the writ in the sum mentioned in the *ac etiam*, the declaration being only for half the sum mentioned in the writ.—*Ib.*

Formerly, indeed, he could not declare in a different county; but now, by R. Hil. 22 Geo. 3., plaintiff may declare in a different county than that named in the writ, without losing his bail.

If the action be by special original, a greater strictness is observable; and in order to prevent incongruity on the record, declaration must strictly pursue the writ. *Turing v. Jones*, K. B. Mich. T. 34 G. 3.

But if the action be notailable, and by bill of Middlesex, *latitat*, or *capias*, the process is deemed a mere summons to bring defendant into court, and plaintiff may afterwards declare for any cause of action different from or not expressed in the writ.

So he may declare in any capacity as assignee of the sheriff, executor, administrator, or even *qui tam*, or the like, though process sued out in his own right generally; because this tends to narrow rather than enlarge plaintiff's demand. *Lloyd v. Williams*, 3 Wil. 141.

So if the demand be still the same, though plaintiff be superfluously described as executor or administrator in process, yet he may declare in his own right.—*Ibid.*

But not if the demand be different; for if process be *qui tam*, he cannot declare generally; because there the demand

Of the Declaration.

demand is not only enlarged, but its very nature changed. *Canning v. Davis*, Burr. 2417. Blac. 723. 2 Wil. 392.

So if process be in a *special* character as *assignee* of a bankrupt, plaintiff cannot declare generally in his own right. *Meggs assignee v. Ford*, 25 Geo. 3.

Where plaintiff, by declaring different from his writ, waives his bail, and after verdict, brings an action on the judgment, he shall not have bail in such action. *Crutebfield v. Seyward*, 2 Wil. 93.

A variance between the writ and declaration in the *ac etiam* (the one being in case on promises, and the declaration in debt) was held not material, the sum sworn to being under 40 l.; and the stat. 13 Car. 2. st. 2. c. 2. on which the *ac etiam* is grounded, operates only where the sum is above 40 l. *Lockwood v. Hill*, C. B. T. R. 310.

N. B. This is a distinction little attended to.—See Appendix I.

The declaration should correspond with process in the names and description of the parties; for if there be a material variance, court will set aside proceedings. Tid. 224.

But if plaintiff sue the defendant by a wrong christian name, and he has appeared by his right name, plaintiff may declare against him by such right name; but it must be a voluntary appearance; for plaintiff cannot file common bail for him by his right name and then declare. *Doo v. Butcher*, 3 D. & E. 611.

The proper way for defendant to take advantage of any variance is, to move the court for proceedings to be set aside: for if the declaration vary from the writ, the court will not now grantoyer of writ, and withoutoyer, were defendant to plead the variance, it would be demurrable. *Vanderplank v. Banks*, 2 Wil. 85.

How to take advantage of variance.

Of the Declaration.

6. C. Of consolidating Declarations and striking out
superfluous Counts.

Of consolidating
declarations.

It is a matter of discretion in the court to oblige plaintiff to consolidate declarations.

But where the causes of action may be joined, and no good reason is shewn why they should not, the court will order them to be consolidated; and if the conduct of plaintiff seems oppressive, will even compel him to pay the costs of the application. *Cecil v. Briggs*, 2 D. & E. 639.

Nor is it sufficient to alledge, that plaintiff may be ready with his witnesses in one and not in the other cause, since he might apply to put off the trial upon that ground.—*Ibid.*

This, however, used to be deemed a good reason; and the courts formerly very rarely obliged plaintiffs to consolidate declarations upon that account. *Minott v. Bridge*, Str. 1178.

It was even refused in ejectments, although ten declarations were delivered on the same demise, for ten houses.—*Ib.* 1149.

Though in C. B. in a similar case they were ordered to be put into one issue. *Grimston v. Grimston*, Cal. Prac. C. B. 119.

So three declarations for the same assault were ordered to be joined. P. R. 151.

Two declarations, one against husband and wife, and the other against the wife only, cannot be consolidated. *Swithin v. Vincent*, 2 Wil. 227.

Of striking out
superfluous
counts.

If the declaration contain any unnecessary counts or superfluous matter of any length, as unnecessary title set out or the like, court, on motion, will order them to be struck out; and sometimes (if evidently put in to swell the declaration,) with costs of the motion.

The

Of the Declaration.

The usual way is, to move the court for rule to shew cause why the declaration should not be referred to the master, (or prothonotary,) for him to strike out the unnecessary counts, and (if the case will warrant it) why plaintiff should not pay costs of the application.

h. Defects in Process how cured, by Declaration or otherwise.

Though the process were wrong, if declaration be right it will sometimes cure it. Of defects in process cured,

As if defendant be sued or arrested by a wrong name, and appears or enters into bail-bond by his right name, and plaintiff afterwards declares right, court will not interpose. *Hole v. Finch*, 2 Wil. 393. by declaration;

Again, if the process be in any respect defective, or there was any irregularity in service thereof, or otherwise on part of plaintiff, if defendant's attorney takes declaration out of the office and pays for it, all preceding irregularity is waived: for the process is only to bring defendant into court, and he cannot have declaration without coming into court. *Caswall v. Martin*, Cas. Tem. Hard. 369. *Whale v. Fuller*, C. B. T. R. 222. by taking it out of office;

So defects in process will be cured by not applying to the court in time. by not applying in time.

It is said that such application must be made two days before executing inquiry. P. R. 127.

In another case any time before interlocutory judgment signed. Bar. 269.

Certainly too late if after writ of inquiry executed. *Knight v. Parker*, Blac. 759.

But the safest rule is to make the application with all possible diligence, for such objections are at best but little countenanced, and if the party has unnecessarily acquiesced under them, the court will be strongly inclined to deny the motion.

Of the Declaration.

3.

3. Of the Rule to declare.

Of the rule to declare.

If plaintiff does not wish to declare within the time allowed (*viz.* before the end of the next term after return of process), he must on the last day of such term get a rule to declare till the first day of the next term, otherwise defendant may sign judgment of *nonpros*: if he still wants further time, he may on the first day of the term, get another rule to declare until the last day of the term, and then another until the first day of the following term, and so on, taking out two in each term, until defendant chooses to stop him; for he may, if he thinks fit, move the court by counsel, *that the last rule may be peremptory*; in which case, plaintiff must declare on or before the day mentioned therein; for the rule when served, is peremptory in the first instance.

How obtained.

This rule is obtained by giving brief to counsel, annexing thereto an office copy of the last rule to declare; the rule is then drawn up by clerk of rules, and copy served on plaintiff's attorney.

Plaintiff must be very careful in declaring on the day mentioned in his rule to declare, or in obtaining a fresh rule for further time, as defendant may immediately on the expiration of the time, sign *nonpros*, without giving plaintiff any rule to declare. *Towers v. Powell*, C. B. T. R. 87.

When Plaintiff has obtained these rules to declare, he should serve copy on defendant's attorney, or stick it up in the office if defendant does not appear.

But should he neglect so to do, and afterwards serve them before defendant had taken advantage of the irregularity by signing judgment, it shall be good and cure the defect. *Jans qui tam v. Hutton*, Blac. 290.

By the terms of the rule, it has no effect if defendant is a prisoner; if, therefore, he be in custody, and plaintiff is prevented from declaring against him on account of its being a joint cause of action, and the other defendants not having appeared nor having been yet outlawed, he

Of the Declaration.

he must move the court, or apply to a judge, and such rule will then be granted until the outlawry or appearance of the other defendants.

B. Of intitling Declarations and special Memorandums.

The declaration is always delivered with a memorandum of the term at the top thereof.

Of intitling declarations and special memorandums.

According to the ancient practice, the declaration was actually delivered in the same term in which the writ was returnable; and although in case of plaintiffs the time has since been enlarged, still the declaration ought to be intitled *as* of the term when the writ was returnable; for it is to be considered as delivered *nunc pro tunc*. *Smith v. Muller*, 3 D. & E. 626.

But when the cause of action happens to arise in the very term when the declaration is intitled, care should be taken to make the memorandum of a particular day in the term previous to the time when cause of action arose; for a general title of the term refers to the first day, and it would therefore appear as if declaration was filed before any cause of action accrued.

If cause of action accrues in the term.

Where, however, the declaration was intitled generally, and the cause of action appeared in declaration to have accrued on the first day of the term, it was, on special demurrer, held good; because formerly when the practice was to declare *ore tenus*, plaintiff could not declare before the sitting of the court; and it is possible that the cause of action might accrue on that day before the court sat, and the declaration delivered afterwards, and the court will make any intendment against so capitious an objection. *Pugh v. Robinson*, 1 D & E. 116.

But if declaration be intitled generally, and in point of fact it was delivered regularly after the action accrued, plaintiff may, on affidavit and motion, have the title of declaration amended accordingly. *Symonds v. Parminster*, 1 Wil. 78.

When it may be amended.

At

Of the Declaration.

At *nisi prius* the party may sometimes give evidence of the real time of suing out the writ so as to avoid the relation to the first day of term. *Morris v. Harwood*, Blac. 312. 320. S. C. Burr. 1241.

When defendant can insist on plaintiff intitled declaration right.

So the defendant has a right to call upon plaintiff to intitle his declaration agreeable to the true time of delivering it to defendant. *Thomson v. Marshall*, 1 Wil. 304.

And this may be done in order to plead in abatement, which must be within four days after declaration; and therefore if it were intitled generally as of the term, and to have relation to the first day thereof, defendant might often be deprived of this privilege. *Wilkes v. Earl of Halifax*, 2 Wil. 257.

So if defendant would wish to plead *plene administravit*, or a tender and means to give in evidence administration of assets, or tender made between the first day of term and the suing out process. *Smith v. Raydon*, 1 Wil. 39. *Winter v. Moreland*, 2 Barn. 125. Cal. Temp. Hard. 141.

Court sometimes inquires into time.

On motion in arrest of judgment, because cause of action was laid in Easter term and declaration intitled of the term generally, it was held well enough, provided bail was not filed till after cause of action accrued, and it was referred to secondary to examine when bail was filed. *Tatlow v. Batement*, 2 Lev. 13.

So that on motions in arrest of judgment, and trials at *nisi prius*, court will inquire when declaration was actually delivered; but not so on demurrer.

If a bill be filed against an attorney in the vacation, the day of filing it may be inserted in a special memorandum; as,

“ Michaelmas term, &c. Be it remembered, that on the 14th day of December 1792, (a day after the cause of action accrued,) A. B. brought into the office of the clerk of the declarations of this court, according to the course and practice of the court, his certain bill against W. B. Gent., one, &c. and filed the same as of Michaelmas-

Of the Declaration.

mas Term, in the 33d year of the reign, &c., which said bill follows in these words, &c. *Dodsworth v. Bowen*, 5 D. & E. 325."

Of the Venue.

Trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. Cow. 176.

Now this county which is laid in the declaration, in order to shew where the action is to be tried, is called the venue, *vicinetum*, it being the place *quem vicini habitant*, the jury being generally collected from the neighbouring parts of the country.

It is very material, therefore, to know in what counties actions ought to be brought, and in what cases it is in the power of either party to change the venue, in order that the action may be tried in some other county more convenient than that laid in the declaration.

This necessarily leads to the consideration of the doctrine

A. Of laying the Venue.

B. Of changing the Venue.

C. Of bringing back the Venue by Plaintiff, and his altering his own Venue.

D. Of laying and changing the Venue by Privileged Persons.

A. Of laying the Venue.

B.

The grand distinction which prevails in all cases respecting the venue is, whether the action be local or transitory. It is a distinction that exists all over the world;

Distinction as to local and transitory actions.

Of the Venue.

world; actions transitory follow the person of the defendant; territorial suits must be discussed in the territorial tribunal. Bl. Com. 3. 384.

The question therefore is, what constitutes a local action?

A local action
what.

Wherever the cause of action necessarily must have arisen in any particular county, or wherever the parties to the suit become such by mere privity of estate, as it is called, such action is local, and must be brought in that county where the cause of action arose, or where the estate lies upon which such legal privity attached.

Definition further explained.

With respect to the first part of this definition, it may be easily understood; and it is obvious, that it must comprehend all actions where the possession of the land is to be recovered, as ejectment and the like; and also where any actual trespass or waste has been committed upon any premises; but the latter part being a more nice and legal distinction, may require explanation: in one word, it means only such actions, where the cause of action does not arise upon any deed or specific contract between the parties, but merely upon that title which the law gives the one to sue, and that responsibility which it annexes to the other in consequence of the connection between them, as landlord and tenant, or the like, arising out of the lands or premises in which they are jointly interested, which is termed in law, privity of estate; whilst other actions grounded on deeds or promises, are said to be founded on privity of contract.

Thus an action of *debt* upon a lease for rent, &c. by the assignee or devisee of the lessor against the lessee (1 Wil. 165. W. Jon. 33.), or by the lessor (6 Mod. 194.), or his personal representatives (Litch. 197.), against the assignee of the lessee, or against the executor of the lessee in the *debet* and *detinet* (2 Lev. 80. 3 Keb. 135.); or in *covenant*, by the grantee of the reversion against the assignee of the lessee (Carth. 182. 3 Mod. 336. 1 Salk. 80. 6 Mod. 194.), is local, and must be brought where the

Of the Venue.

the estate lies, because such action is founded only on the privity of *estate*.

So perhaps in an action by an administrator, the venue should not be out of the diocese of the bishop who granted him administration. *Mellor v. Barber*, 3 D. & E. 387. *Sed Q.*

ACTIONS by administrator. Q.

Such then being the criterions of a local action, it follows that a *transitory* action must be such as may have arisen in any county.

Transitory actions what.

Thus in all actions of debt or covenant (except as above mentioned), assumpsit, assault, slander, detinue, deceit, trover, and the like, where the injury might have been sustained in one county as well as another, the venue may be laid in any county; because it will be presumed, unless the contrary is shewn, that the cause of action did arise in that county in which the venue is laid; otherwise, upon proper application to the court, as will be presently shewn, it may be changed.

Thus there are several actions which at first view might appear local, but on further consideration are clearly transitory; such as upon an assignment of a bail-bond, or the like; or against a sheriff for a false return, or an escape. It does not necessarily follow, that the cause of action must arise in the county where he is sheriff; for a sheriff may assign a bail-bond, or may make his return to a writ in any county, and an escape in one county is an escape every where. *Str.* 727. *Griffiths v. Walker*, 1 Wil. 336. S. C. Say. 54.

On bail-bond.
False return.

Escape.

Sometimes a cause of action arises partly in one county and partly in another; in which case, it is at the election of the plaintiff to lay the venue in either; as in cases of carriers, or of hiring a horse in one county to ride to another, 1 Lev. 286.; or in actions on the case for not repairing a wall or the like, whereby plaintiff's land was overflowed, if the wall be in one county and plaintiff's land in another, 1 Lev. 114.; or for maliciously suing an execution in Middlesex, whereby plaintiff was arrested in Dorsetshire, Cro. Eliz. 574.; or if

Where action arises in two counties plaintiff may elect. Instances.

two

Of the Venue.

two conspire in one county to indict another, and make the execution of the conspiracy in another, 7 Co. 1., *Bulwer's case*; and the like. Mayor, &c. of *Berwick v. Ewart*, Blac. 1069.

So if there be matter of law or record, and matter in pais in different counties, plaintiff has his election. *Griffiths v. Walker*, 1 Wil. 336. *Scott v. Bress*, 2 D. & E. 241.

And where the cause of action arises in two counties, the venue shall not be laid in a third. *Shirley v. Collis*, Blac. 940.

Where action
arises abroad.

The same distinction also prevails where the cause of action arises beyond the seas.

If transitory
brought here.

All actions upon contracts, upon deeds, upon personal injuries, as assaults and the like, for injuries to personal property, as taking a ship and the like, or any other transitory action, though arising out of the realm, may be brought in this country.

Even an action of trover for timber cut in Ireland. Str. 614. *Dutch W. I. Comp. v. Hen. Van. Moses*.

In some instan-
ces carried to
local actions.

There have been instances indeed of local actions being brought here, as for destroying fishing-huts upon the Labrador coast, *Admiral Palliser's case*, Cow. 181., and for pulling down the houses of some suttlers, *Capt. Gambier's case*, *ib.* 180. But they seem to have been countenanced rather *ex necessitate rei*, lest there should be a failure of justice, and the injured party not able to obtain any other redress, than to have been supported upon the strict principle of law. *Moslyn v. Fabrigas*, Cow. 181.

They should be looked upon, therefore, only as exceptions to the general rule.

How venue laid.

If a transitory action arising abroad be brought here, the venue may be laid in any county; but if it should be such an action as renders it necessary to state where it arose,

Of the Venue.

arose, as on a deed, or bill of exchange, or taking a ship, or the like, the real place may be alleged; but it should be followed with a videlicet and a venue corresponding with that laid in the declaration; as for instance, if on a bond, it should be stated to have been made at Fort St. George in the East Indies, to wit, at London, in the ward of Cheap; or if for taking a ship, that it was taken on the high seas, viz. in Cheapside, or any other place, as a venue merely *pro forma*. *Ib.* 178, 179.

For if the bond be stated to have been made at London, and on oyer it appears dated at Fort St. George, or the like, it would be bad on demurrer. *Ibid.* 178.

If the action be really local, and the venue be not of the proper county, should it appear on the face of the declaration, it would be demurrable to; or if it is proved on the trial, plaintiff will be nonsuited.

Consequence of venue being wrong in local actions.

But it should be a special demurrer as a bad venue, or the want of one is cured by the statute of jeofails. *Mellor v. Barber*, 3 D. & E. 387.

How demurrable to.

Where a proper venue is laid in the body of the declaration, the venue in the margin shall not vitiate it: but if there be no venue in the body, then reference must be had to the margin; the county in the margin will help, but not hurt.—*Ibid.* *Sutton v. Fenn*, 3 Wil. 340.

If right in body of declaration well.

Venue in margin, London; in declaration, Oxfordshire; cause tried in Oxfordshire; held well. *Sheers v. Bartlett*, Bar. 484.

How venue;

Where the proceedings are by original, the venue in declaration must be laid in the county where the original issued, or the plaintiff will lose his bail; but not so if it be only a common bailable writ with an *ac etiam*.

if by original.

By different acts of parliament, many actions of a transitory nature must be brought in the county where they arose, otherwise the defendant will be entitled to a verdict.

Venue altered by act of parliament.

T

Such

Of the Venue.

In penal actions.

Such is the statute 21 Jac. 1. c. 4. which enacts, That all suits on penal statutes shall be laid in their proper county.

This statute extends to informations as well as actions. 4 Inst. 172. 1 Vent. 8. 3 Inst. 193. Cro. Car. 112. Cro. El. 737. 1 Sal. 373. Cont. 4 Mod. 159.

Construction,
21 Jac. 1. c. 4.

This act does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby. 1 Salk. 372. by ten judges; though C. J. Holt said, that he thought where any subsequent act gives any popular action, it should be laid in the proper county, within the equity of 21 Jac. 1.

In a *qui tam* action for usury, the venue is well laid where the offence was completed. *Scott v. Bress*, 2 D & E. 238.

In actions
against justices,
&c.

Such also is the statute of 21 Jac. 1. c. 12. sec. 5. whereby all actions brought against any justice, mayor, or bailiff of any city, town corporate, headborough, portrieve, constable, tything-man, collector of subsidy, fifteenths, churchwardens, or other persons called sworn men, executing the office of churchwarden, or overseer of the poor, and their deputies, or any of them, or other persons acting in their aid, or by their command, for any thing done in their official capacity, must be brought in the county where the fact was committed.

Construction
thereof.

If an action be against a justice of peace, &c. for any thing done by colour or under pretence of his office, though not strictly within the duty of his office, it comes within the act. *Vaughan* 114. *Daniel v. Wood*, 5 D. & E. 1.

But if a constable, under a warrant, take a man and carry him before a magistrate, who discharges him, and soon after, on a dispute happening, the constable beats him, this is not within the statute, and the constable need not be sued within the county. *Anon.* Str. 446. So

Of the Venue.

So for protection of revenue officers, the like rule is enforced by 20 G. 3. c. 70. s. 34. in all actions brought against *excise officers*; and by 24 Geo. 3. sess. 2. c. 47. s. 35. in all actions brought against *custom-house officers*, or any acting in their aid, for any thing done by virtue of their office. Against revenue officers.

And this, if they act *bonâ fide* as officers, though illegally. *Daniel v. Wood*, 5 D. & E. 1.

And as a further protection, by 9 Geo. 2. c. 35. s. 26. whenever revenue officers prosecute for assaults committed upon them, the indictment may be tried in any county. But this only extends to assaults made upon them in the execution of their office. *The King v. Cartwright*, 4 D. & E. 490. By revenue officers.

This is also a common provision in other acts of parliament of a public nature, as turnpike acts, or the like. As provided by other statutes.

But where an act confers certain privileges on officers who may be sued for things done in pursuance of that act, and a subsequent act imposes new obligations on the old officers, the privileges of the former statute do not attach on them in respect of things done under the latter: therefore toll-gate keepers sued for acts done under 25 Geo. 3. c. 51. need not be sued in the county where the fact was committed, as they must be under the 13 G. 3. c. 78. s. 81. *Baming v. Skelton*, 5 D. & E. 16. General rule.

25. Of changing the Venue.

25.

Although the venue in transitory actions may be laid in any county, yet upon application to the court, and proper cause shewn, it will very frequently be ordered to be changed. In what actions it may be changed.

It is said indeed by Lord Mansfield, that not in transitory only, but even in local actions, the court will order the venue to be changed where there is a *dignus vindice nodus*, but not otherwise by any means. *Loft. 50.*
3 Blac. Coin. 384.

Of the Venue.

Upon what grounds.

The general grounds upon which the court will order the venue to be changed are,

1st, Cause of action arising elsewhere.

1st, When the cause of action arises in the county to which defendant moves to change the venue.

But then it must *wholly* arise there, and not elsewhere out of that county, nor in anywise in the county in which the venue is already laid.

And there must be an affidavit to that effect, strictly stating, that the cause of action *arose in B. and not in A. or elsewhere out of B.*; for if it only says, that the cause of action arose in B. and not elsewhere out of B. without particularizing that it did not arise in A. it will be bad. *Allen v. Griffiths*, 3 D. & E. 495. Say. 77. Wil. 178.

Which must be positive, and not merely to defendant's knowledge and belief. *Bellshaw v. Porter*, Bar. 478.

This then is the criterion; and perhaps it cannot be better illustrated than by the different modern determinations as to changing the venue in *actions* in libels.

Action for a libel in a country newspaper; motion to change the venue into the county where it was *printed*; refused, because it was circulated elsewhere. *Pinkney v. Collins*, 1 D. & E. 571.

So where a libellous letter was written in Berkshire but directed into Surry, venue laid in London, court refused to change it into Berkshire. *Cliffold v. Cliffold*, *ibid.* 647.

Because defendant could not swear that the cause of action wholly arose in the county into which he moved venue to be changed, and *not elsewhere*.

But where a libel was both written and published in one county, as a letter written at one place and sent to another, both in the same county, the court will change the

Of the Venue.

the venue into that county, because the whole publication was confined within it. *Freeman v. Norris*, 3 D. & E. 506.

So where a libel is written in one county and not opened in another, though it passes through it, as a letter written in Yorkshire and sent by the post into Germany, where it was opened, court ordered venue to be changed from London to Yorkshire, because defendant was warranted in his affirmation that the cause of action arose in Yorkshire, and not elsewhere within the kingdom. *Metcalf v. Markham*, 3 D. & E. 652.

Whenever, therefore, the fact can be positively sworn to in the terms above mentioned, it is a matter of course for the court to change the venue; but not otherwise.

An affidavit of one defendant will do. *Box v. Read*, Bar. 482.

The second ground for the court changing the venue is, 2d, Trial partial, or not satisfactory.

When it appears upon the circumstances laid before them, that there is a probable ground to apprehend, that a fair, impartial, or at least, satisfactory trial cannot be had.

And this may be occasioned by local prejudices, or interest, or the like. *Mayor of Poole v. Bennett*, Str. 874. *Mylock v. Saladine*, Burr. 1564. *Petys v. Berkeley*, Cow. 510.

But it is not a motion of course; the court will expect proper affidavits to support it. *Mayor of Bristol v. Proctor*, Wil. 298. *Rex v. Harris*, Burr. 1333.

Upon this ground, when strong reasons are suggested, the venue is changed even in local actions, as ejectment; but the usual way is, to take a rule to try the cause in the next county, and not to change the venue. 1 Wil. 77. *Mayor of Bristol's case*.

Of the Venue.

3d, Special grounds, as witnesses residing elsewhere.

The above are the two usual grounds of application to change the venue; but there are many actions in which the common affidavit cannot be made, because the cause of action is not wholly and necessarily confined to a single county; and therefore the venue cannot be changed unless special cause is shewn.

Such are actions upon bonds or other specialties, promissory notes, or bills of exchange, because they are *bona notabilia* any where, *Kirk v. Broad*, Say. 7. *Downes v. Brian*, Blac. 993. 1 Wil. 41. Cont. 1 Wil. 173.; actions for *scandalum magnatum*, 2 Stra. 807. Ld. Ray. 1418. Sal. 668.; escapes, Sal. 670.; false returns, Sal. 669.; against carriers, Sal. 670., and the like transitory actions arising in more counties than one: yet it may be extremely inconvenient to the defendant to try the cause in the county where the venue is laid. There is, therefore, a third ground of application, namely, The alleging some special reason for the venue being changed elsewhere.

Formerly, indeed, the mere circumstance of the witnesses living in the county to which venue was moved to be changed, was not deemed a sufficient reason. *Beavis, administratrix, v. Moore*, cited in notes, 1 D. & E. 782.; and *Pole v. Harrabin*.

But in the later case of *Foster v. Taylor*, 1 D. & E. 781. where the action was on bond, and pleas *non est factum soluit post diem* and usury, venue was changed from London into Lincolnshire, on the ground that defendant's defence arose there, and both plaintiff and defendant's witnesses lived there.

But if only defendant's witnesses lived there and not plaintiff's, it would not be sufficient; because it might be equally convenient to plaintiff to try the action where he had laid the venue. *Fleche v. Godfrey*, E. 23 G. 3. B. R. cited in 1 D. & E. 782.

Into what counties it can be changed.

There are certain counties into which the venue cannot be changed.

It

Of the Venue.

It seems to be the better opinion, that it cannot be changed into any county in Wales. Not into Wales.

I say the better opinion; because, although the question has at various times been brought on, it has never been determined; but in all the cases, it has either been granted, because no cause has been shewn, or it has been denied, upon the plaintiff's undertaking to give material evidence in the county where the venue was laid, or the court have taken time to consider the point, and have never given their judgment.

Of the first are the cases of *Tindal v. Gwynne*, Str. 1270. *Waddington v. Thelwell*, Burr, 2450. *Freeman v. Gwynn*, Blac. 962.; and *Jones v. Rees*, Hill. 24 G. 3. Of the second, *Pritchard v. Pugh*, Dougl. 262. Of the last, *Price v. Griffith*, Wil. 221.

But in one case it is said to have been absolutely refused. *Watkins v. Hibert*, Say. 48.

The difficulties seem to be, first, if changed into a Welch county, to whom must the writ of inquiry be directed in case of judgment by default; *per J. Buller*, in *Pritchard & Pugh*, Do. 263. And if it be changed into the next adjacent English county, how can the affidavit be made, that the cause of action arose there. Burr. 2451. Why.

N. B. I understand, that in cases of judgment by default, in actions where the venue is laid in Wales, it is the practice to direct the writ of inquiry to the Welch sheriff, and have it executed there, and not in the next English county, as where an issue is to be tried.

Where the venue is changed without opposition, the rule is, to change the venue into a Welch county; yet the cause is to be tried in the next adjoining English county, Blac. 962.: but the court will not change it to the next adjoining English county. *Moor v. Fernibaugh*, Wil. 138. How if by consent.

Q. Why then cannot the venue be changed into Wales; and if judgment by default, writ of inquiry directed

Q.

Of the Venue.

directed to Welch sheriff; if a trial, tried in the next English county?

Hardship of
present practice.

At present, however, any plaintiff, for any trifling cause of action in Wales, may lay the venue in London, and compel defendant to bring all his witnesses there.

Not into coun-
ties palatine.

Venue not to be changed into counties palatine, Str. 807. *Richardson v. Walker*, Bar. 488.; but it may in- to Chester, because the court can send down record by *mittimus*. Ray. 1418. 1 Wil. 222. *Price v. Griffiths*.

Q.

Though in a late case, *Marsden v. Bell*, Hil. 28 Geo. 3. on motion to change venue from Middlesex to Lancaster, it was granted; but court directed, that on these motions to counties palatine, the words "under- taking not to assign error for want of an original," be added to the common rule.

Venue not to be changed into a third county without consent. Str. 1216. *Southouse v. Boak*.

Not into coun-
ty, to delay a
trial.

Court will not, in general, change venue into any county, whereby trial may be delayed.

As into either of the three northern counties, preced- ing the spring circuit. 1 Wil. 138. *Moore v. Fernhaugh*.

Nor into Bristol, there being no Lent assizes, Str. 1180. *Howarth v. Willett*.

Nor into Hull, Canterbury, &c. because it is not known when an assize may be held there.

But in Easter and Trinity term, this objection does not hold; and even at other times it is solely in the dis- cretion of the court. *Rickaby v. Wilson*, Bar. 490.

Venue cannot be changed from a county at large into a city and county. *Lewis v. Askham*, Bar. 489, 490.

Of the Venue.

But it may from a county at large into the city of London. *Lutwich v. Eames*, Bar. 481.

If cause of action arise in Berwick, venue should be in Northumberland. *Mayor of Berwick v. Ewat*, Blac, 1036. Burr. 834. 859.

Defendant cannot move to change the venue the last day of term, there being no day left for plaintiff to shew cause. *Wood v. Winch*, Bar. 480. *Thomeur v. Rand*, ib. 486.

When motion to change venue to be made.

Unless declaration was delivered so late that defendant could not move sooner. *Hayward v. Wells*, Bar. 489.

Defendant cannot move to change the venue in any action until he has appeared. *R. East*. 24 Car. 2.

Nor after plea pleaded. Str. 858. *Dickinson v. Fisher*,

But the defendants having put in their plea after a rule for shewing cause why the venue should not be changed, and before it was made absolute, the court held, that the putting in the plea by inadvertancy, was no waiver of the rule, and gave defendants leave to withdraw it on payment of cost, and made rule to change venue absolute. *Herbert v. Flower*, Bar. 492.

Formerly, it was doubted whether motion could be made after defendant had obtained time to plead, and in many cases held not; but by rule 16 Geo. 2. "any defendant may move to change venue at any time before plea pleaded, in all such actions where the venue may be changed by the course of the court, notwithstanding such defendant may have applied for and obtained further time to plead before such motion made."

But not if the order obtained be to plead *issuably*, rejoin *gratis*, and take short notice of trial for the first sitting in London or Middlesex; because there a trial would be lost. *Petyt v. Berkley*, Cow. 511. K. B. *Burgefs*

Of the Venue.

Burgefs v. Carter, ib. C. B. ; Cont. Wightman v. Thompson, 1 Wil. 245.

So motion may be made after an order for time to perfect bail. *Newly v. Burton, Bar. 483.*

Or after an order for an imparlance. *Blackstock v. Payne, Bar. 487.*

If a declaration be delivered so early in term that the defendant has eight days in that term, he cannot move to change the venue the next term. *Asplin v. Gray, Str. 211.*

But if he has less than eight, and has not pleaded, he may. *R. Mich. 1654.*

If proceedings are by original, court will not change venue without defendant undertakes not to bring error for want of an original; which would otherwise be fatal.

How to be made.

No notice of motion is necessary to be given to the adverse party or his attorney.

In term time.

It is moved by counsel or serjeant, as case may be; in B. R. it is absolute in first instance; but in C. B. there must be another motion to make it absolute. When rule made out, serve it on plaintiff's attorney, who will call and alter declaration with you.

There must, of course, be the affidavit first sworn by defendant, or one of them (if many).

Form of affidavit.

F. B. of, &c. the above defendant, maketh oath, and saith, That the plaintiff's cause of action (if any) arose in the county of A. and not in the county of B. as laid in the declaration, nor elsewhere out of the county of A.

In vacation.

If in vacation, a judge's order is obtained for that purpose, or producing the usual affidavit and counsel or serjeant's hand to a brief, part of the order being, "that plaintiff be at liberty to change the same back again
" on

Of the Venue.

"on undertaking to give evidence in the former
"county."

C. Of bringing back the Venue by Plaintiff, and
his altering his own Venue.

Although the defendant upon the common affidavit may change the venue, yet the plaintiff is not concluded by his single affidavit, but is at liberty to aver that the cause of action arose in the county where the venue is laid; and the court will suffer him to retain the original venue upon his undertaking to give material evidence arising in that county.

Of bringing back the venue by plaintiff, and of his altering his own venue.

On what terms.

Formerly, indeed, it was required of plaintiff to give no other evidence except what arose there, 1 Keb. 189. 1 Sid. 442.; but it has since been held sufficient to give *some material evidence* only.

Of giving material evidence in county.

If, however, plaintiff upon the trial does not give some evidence of the cause of action, or part thereof, arising in the county, he must be nonsuited. *Santler v. Heard*, Blac. 1034.

What amounts to that.

Nor is it enough to shew that the witnesses to prove the contract resided there. *Ibid.*

But it has been held a sufficient compliance with the undertaking, to prove a rule of court in Middlesex for defendant to pay money into court, though that rule was obtained after the undertaking of plaintiff to give material evidence. *Watkins v. Towers*, 2 D. & E. 275.

Rule to pay money into court.

Because the payment of money into court was an admission of something due to plaintiff on the contract stated in the deed, and superceded the necessity of that proof which the plaintiff would otherwise have given; and the contract as stated was on a deed in Middlesex.

So it is sufficient to prove, that the cause of action arose abroad; because then the fiction of law prevails with

Action arising abroad.

Of the Venue.

with respect to the venue in such cases. *Gerard v. De Robeck*, 1 C. B. T. R. 280.

But this undertaking is absolutely necessary; for it is not merely sufficient to falsify defendant's affidavit by plaintiff's swearing that the cause of action arose where venue laid. *French v. Coppinger*, 1 C. B. T. R. 216.

What sufficient cause to bring back venue.

Although the venue has been changed into the county where cause of action arose, yet if it appears on part of plaintiff, that such county is an improper county to try it in, by reason of partiality or interest of the jury, or otherwise, the original venue shall be retained. *Slaughter v. Bradock*, Burr. 2447. *Petyt v. Berkley*, Cow, 510. Sal. 670.

What not.

But not sufficient, because witnesses live at a distance, and will not come so far. *Fogoe v. Gale*, 1 Wil, 162.

When plaintiff must move to bring it back.

Plaintiff must move to discharge defendant's rule for changing the venue before replication. *Dickinson v. Fisher*, Str. 858.

It will be too late after he has altered the issue and delivered it to defendant; motion to bring back the venue was, in such case, discharged, though without costs. — *v. Beddington*, Mich. 20 G. 3. B. R. 1 Crom. 114.

How he can do it, by moving to amend.

But although the plaintiff may not regularly move to change the venue, he may in effect do it by moving to amend; which was done in this case by striking out Dorsetshire and inserting Middlesex. *Strond v. Tilley*, Str. 1162.

So in the case of *Rivett* and another *v. Cholmondeley*, though defendant had changed venue on the usual affidavit. Str. 1202.

It was for this reason that the court suffered plaintiff to bring back the venue after it had been changed by defendant, and the cause had gone down to trial, and plaintiff had been nonsuited, and the nonsuit afterwards set aside and a new trial directed; and the cause had been

Of the Venue.

been down a second time, and for defect of jurors, was made a *remanet*, because *per* Lord Mansfield, the plaintiff may at any time move to amend his deed and alter the venue; and we think it an idle circuitry to put him to this; and if we permit him now to bring the venue back, he does it at his peril; because if he does not give material evidence in London, he must be nonsuited; and if it should appear to be a local action by statute, he must be nonsuited at the opening. *Bruckshaw v. Hopkins*, Cow. 409.

But the case of ——— *v. Boddington* above cited, is later in point of time.

In an action on a remedial law, when the time had expired for bringing a new action, plaintiff allowed to alter the venue, it having been laid wrong by mistake, though after plea pleaded and issue joined; but court would not have done it on a penal statute, *Cook v. Shore*, Bar. 12.; or in a common case, *Bird, executor, v. Foster*, Bar. 19.

When alteration of venue allowed.

In transitory actions plaintiff, after the effoin day of the subsequent term after appearance, shall not alter his own venue, though he would pay costs, or give an imparlance. Str. 211. 858.

Within what time plaintiff must alter it.

D. Of laying and changing Venue by privileged Persons.

D.

An attorney, when plaintiff, may lay the venue in Middlesex, because his attendance is supposed to be necessary at the courts at Westminster, and he may retain it there. *Pope v. Redfearn*, Burr. 2027. *Pilkington v. Hanlin*, Say. 153.

Attornies, &c.

And this though he be resident in the country. *Pye v. Leigh*, Blac. 1065. 2 Show. 242.

The same privilege extends to serjeants, barristers, masters in chancery, clerks of assize, judges clerks, and

How far it extends to them as plaintiffs.

Of the Venue.

and other officers of the court. 2 Show. 176. 242. Mod. 64. Str. 822. 1 Wil. 159. *Knight v. Barneby*, Ray. 1253. Sal. 670. *Girdler v. Watheus*, Bar. 484.

But this privilege does not extend to them if they sue in *auter droit* as heirs, executors, or administrators. *Pope v. Redfearn*, marginal note, Burr. 2027.

Or if they declare as common persons; as if plaintiff does not sue by attachment, but by *capias*, *Welland v. Frument*, Bar. 479.; or by original, *Girdler v. Watheus*, Bar. 484.; or if he declares by attorney instead of in person. *Dent v. Lambert*, Bar. 479.

But not as defendants.

But it is now settled, that this privilege only extends to an attorney where he is plaintiff, and that as defendant, he has no privilege to change the venue into Middlesex. *Yeadley v. Roe*, 3 D. & E. 573.

Because there is no necessity for an attorney to go down into the country to attend a cause where he is defendant. *Pope v. Redfearn*, Burr. 2028.

Though formerly it used to be held otherwise. See a variety of cases in *Pope* and *Redfearn*, when the present practice was first settled.

C H A P. VII.

Of the Proceedings from Declaration to Issue.

SEC. 1. *Of claiming Conusance.*

SEC. 2. *Of demanding Oyer.*

SEC. 3. *Of Imparlance.*

SEC. 4. *Of pleading in Abatement.*

SEC. 5. *Of paying Money into Court.*

SEC. 6. *Of pleading in Bar.*

SEC. 7. *Of the Rule to plead, demanding Plea, searching for Plea, and signing Judgment for want of Plea.*

SEC. 8. *Of procuring longer Time to plead.*

SEC. 9. *Of moving to abide by Plea.*

SEC. 10. *Of the Pleas of Tender and Set-off.*

SEC. 11. *Of Replying, Rejoining, &c.*

SECTION I.

Of claiming Conusance.

A. Of the Nature of inferior Jurisdictions, and what Courts can demand Cognizance.

B. In what Cases it will be granted or refused.

C. Of the Time and Manner of claiming it.

WHERE franchises, either by letters patent or prescription, have a privilege of holding pleas within their jurisdiction, if the courts at Westminster entrench on their privileges, and would have the cause determined before them, they must demand conusance; for a de-

B. Of the nature of inferior jurisdictions, and what courts can demand cognizance.

Of claiming Conusance.

a defendant cannot plead it to the jurisdiction, because he is arrested by the king's writ; but where the king's writ doth not run, the defendant is not legally convened, and therefore may plead it to the jurisdiction. 4 Inst. 224.

Three sorts of inferior jurisdictions.

For the better understanding of this matter, it will be necessary to state the differences between inferior jurisdictions, which are of three sorts.

1st, Merely a privilege of holding pleas.

The first is *tenere placita*, or a privilege of holding plea, which is the lowest, and is a concurrent jurisdiction; in which case the plaintiff may proceed in the inferior court if he will; but that does not deprive the subject of having the cause tried in a superior court, if he chooses to remove it by *certiorari*, *habeas corpus*, &c.; and that for good reason; for if it were otherwise, a man who comes by chance into an inferior jurisdiction, might be arrested there, and detained in gaol a long time for want of bail.

2d, Conusance of pleas.

The second sort is *conusance of pleas*; which is by grant to some lord of the franchise, and he alone can take advantage of the privilege, neither the plaintiff nor defendant; for the defendant cannot plead it to the jurisdiction of the superior court, but the lord, by his bailiff or attorney, must come in and claim it; and though the lord ought to have it, the superior court is not ousted, for the plea remains under the controul of the superior court; and day is given upon the roll there to the parties to be in the inferior court at a day certain; and the parties are commanded there, and the tenor of the record is sent, for the inferior court to proceed, and if justice is done there, it is well, but the record remains above; but if justice is not done there, as if the court will not proceed upon the day prefixed, or if the judge misbehaves himself, &c. the plaintiff may have a re-lummons. And it is the benefit of the lords only which is considered in this matter. But these jurisdictions were hardships to the subject, and allowed by 27 H. 8. c. 24. rather for their antiquity than for any other reason; and they were detrimental to the prerogative of the crown, and therefore *certiorari's* were always

Of claiming Conusance.

always allowed to prevent the grievances of these inferior jurisdictions.

The third sort are exempt jurisdictions, as where the king grants to a city, &c. that the inhabitants shall be sued within the city, and not elsewhere; such a grant may be pleaded to the jurisdiction of the superior court, if there is a court there which can hold plea of the cause. No one but the defendant himself can take advantage of this; and if he is sued there, he may waive his privilege, and remove the cause by *certiorari*, *habeas corpus*, &c. *Ld. Raym.* 836.

3d. Exempt jurisdictions.

As the demand of conusance is made against the general jurisdiction of the king's superior courts, and against the administration of justice therein; the claim is always nicely looked into, and the superior courts tie them down to the strictest practice and form imaginable in demanding it.

Great strictness in mode of claiming conusance.

Claim of conusance must be entered upon the record, and every thing stated with great exactness and precision that is to take away the jurisdiction as it may be demurred to, or the facts therein alleged, controverted by pleading. *Leasingby v. Smith*, 2 *Wil.* 409.

It must be entered on record.

In transitory actions between the scholars of the universities of Oxford and Cambridge, the university shall have conusance, because by their charters, confirmed by act of parliament, they shall have jurisdiction over the persons of their scholars.

Allowed to universities.

The university of Cambridge claimed conusance, and produced the certificate of the chancellor that the parties were of the university; and upon a rule to shew cause it was objected, that the claim ought to be entered upon a roll, and an affidavit to verify the certificate should be produced; and of that opinion was the court, and discharged the rule, and then it was too late to make a new claim. *Paternoster v. Graham*, *Str.* 810. *Vide* the case of *Foster* against *Hexham*, 1 *Ld. Raym.* 427.

How.

U

The

Of claiming Conusance.

When.

The university is not entitled to conusance unless the defendant be resident in the university, and there must be an affidavit of it.

Conusance may be demanded though the defendant be in the custody of the marshal. *Ld. Raym.* 135.

To what actions.

The charter of 14 H. 8. respecting the privileges of the university of Oxford, extends to actions arising in any part of England; but this does not intend that scholars, as plaintiffs, shall have the privilege of suing in the university in causes of action arising in any part of England; but when they are defendants this privilege extends all over England.

Residence necessary;

But then it is absolutely necessary that such scholars or members being defendants, shall be *resident* in the university, and the privilege extends from the highest members to the lowest servants there *residing*; but the superior courts construe this privilege very strictly, therefore it ought to be made to appear clearly to the court that the defendant is a scholar residing.

which must be certified.

It should be certified by the chancellor, and appear upon record before the privilege can be allowed.

Affidavit also necessary.

The claim of conusance is tantamount to a plea in abatement, the truth whereof must be verified by affidavit; this seems to be the reason why affidavits were first introduced in these motions for allowing conusance.

An affidavit seems necessary as well as the chancellor's certificate of residence. *Hayes v. Long*, 2 Wil. 312.

It is a general rule, that wherever the defendant can plead to the jurisdiction of the courts at Westminster, there the franchise may demand conusance, but not *vice versa*. *Carth.* 11. 354.

When not allowed.

Conusance will not be allowed if it occasions a failure of justice, 2 Vent. 363. 3 Lev. 149.; or if the action be brought against the person himself who claims the

Of claiming Conusance.

the franchise, unless he hath also the power in such case of making another judge. Hob. 87.

Conusance cannot be claimed of any action that was not in *esse* at the time of the grant. 14 H. 4. 20.

Conusance won't be allowed where trespass, &c. is brought against a foreigner who has nothing within the franchise, for they cannot oblige a stranger who has nothing to answer. 22 Aff. 83.

Conusance must be claimed in the first instance, or at the first day the party has. Burr. Rep. 2824. Must be claimed in first instance.

Conusance of pleas refused to the university of Oxford, because neither claimed in due form nor in due time. 2 Wil. 409.

Claim of conusance must be made before an imparlance, and must be made the first day the party has in court, even upon the return day of the writ, if the cause of action appears therein; if not, then upon the first day given upon the declaration. *Leasingby v. Smith*, 2 Wil. 413.

Conusance must be demanded before full defence is made, Rast. Ent. 128. or imparlance prayed; for these are a submission to the jurisdiction of the superior court, and the delay is a laches in the lord of the franchise. Before imparlance;

In C. B. claim of conusance by the university of Oxford was disallowed, as coming too late after plea pleaded and replication tendering an issue; rule to shew cause why the claim should not be allowed, was discharged. Bar. 346. *Wells v. Trsborn*. or plea pleaded.

In assault, the latitat was of Michaelmas term, but the defendant never appeared; and this term the plaintiff entered an appearance for the defendant and filed common bail, and left a declaration in the office; and now, before plea pleaded, imparlance prayed, Blackstone exhibited a claim of conusance by the Earl of Litchfield chancellor of the university of Oxford, stating
U 2

Of claiming Conusance.

stating the charters of the university, confirmed by statute 13 Eliz. and alledged, that the defendant was a privileged person, as being a matriculated person, and fellow of Brazen Nose college, where he was a master of arts and in holy orders; this claim was under seal of the chancellor's office, and was (previous to the present motion,) entered upon record, together with a letter of attorney from the chancellor, empowering one Elderton, an attorney of this court, to appear in his name and demand the conusance. There were also affidavits from the defendant himself and another person, which proved him to be, at the time of the writ sued, and at the time of making the claim, a matriculated person; on reading all which, and also the charter of king Henry the eighth under the great seal, and an exemplification of the statute 13 Eliz. (which, though printed in the statute books, is only a private act,) the court granted a rule to shew cause why the cognizance should not be allowed, and in the mean time all proceedings to stay. Blac. 454. *Kendrick v. Kynaston*.

None is bound to claim conusance until he is intended by law to have some legal notice of his franchise being entrenched upon.

What a bar to such claim.

In order to bar a claim of conusance, some laches or default in him should be shewn, and that he might have claimed it sooner after such notice as above. *Rex v. Agar*, Burr. 2820.

The authority of an attorney continues after a claim of conusance, but not after a writ of error brought. *Ld. Raym.* 896.

The principal cases on this subject are, *Ld. Raym.* 427. 475. 836. 1338. *Burr.* 2824. 1 *Wil.* 310. 2 *Wil.* 406. 10 *Mod.* 126. *Hard.* 505.

SECTION

SECTION II.

Of Demanding Oyer.

A. Of what, and in what Cases Oyer may be demanded.

B. Of the Time and Manner of demanding and giving Oyer, and the Consequence of refusing it, &c.

C. How the Deed must be set out on Oyer, and the Use of craving it.

A. Of What, and in what Cases Oyer may be demanded.

Formerly the defendant was not bound to plead till Oyer and a copy of the original writ had been given him if demanded; but it is now the settled practice of both courts not to grant oyer of the original, and if defendant craves oyer thereof, plaintiff may proceed without taking any notice, and sign judgment for want of a plea, *Boats v. Edward*, Do. 227. *Hole v. Finch*, 2 Wil. 394.

Not of original writ.

So that all that delay which was formerly occasioned by such oyer, and by taking advantage of frivolous variances between the writ and declaration, is at an end.

Still, however, in all cases where the ends of substantial justice require it, oyer must be granted.

Whenever, therefore, either the plaintiff or defendant grounds his action or defence upon any deed, he must in the pleadings make a profert of that deed (or shew some sufficient reason for not doing so,) in order that the other party may crave oyer, and be able to get at the knowledge of its contents.

Whenever deed pleaded, a profert must be made, or reasons shewn.

If a profert be made, oyer cannot be dispensed with, because the party is supposed to have brought the deed into court, and it is absurd to say, that it is out of his power to give a copy of it.

If a profert, oyer not to be dispensed with.

Of demanding Oyer.

For this reason the party pleading a deed was often formerly in an awkward dilemma, because by the old rules of law it was, in most cases, absolutely necessary to make a profert, although, perhaps, in point of fact the party making it had not the deed so as to be able to give oyer of it. *Soresby v. Sparrow*, Str. 1126. 1 Wil. 16.

In what cases
no profert re-
quired.

But the courts have of late relaxed in this strictness, and have determined, that in all cases of extreme necessity, a profert may be dispensed with.

As if the deed be in the possession of the adverse party, or has been destroyed by him; or if it be lost by time or accident, or the like, where the party cannot make a profert of the deed.

But it may be
pleaded accord-
ing to fact.

In all which cases, the declaration or plea shall be good without any profert, the party pleading it according to the fact. *Read v. Brookman*, 3 D. & E. 151.

If profert made,
declaration
amended.

But if by mistake, he should make a profert; he must move the court to amend the pleading, and plead it according to the fact. *Totty v. Nisbitt*, B. R. Trin. 1784. *Matison v. Atkinson*, 3 D. & E. 153. N.

The fact may
be denied by ad-
verse party.

The adverse party may bring the matter into question by pleading, either that it is not his deed, or that it is not lost; and the party pleading it must give evidence to support his allegation that the deed is destroyed by time or accident, or as the fact stated. *Read v. Brookman*, 3 D. & E. 158.

If profert is made unnecessarily, oyer shall not be given. Sal. 497. *Morris's case*.

If defendant
party to deed.

Where defendant is party to an indenture himself, he ought not to demand oyer but set it forth himself; and if he demands oyer and plaintiff gives it him imperfectly, it is at defendant's peril. Sal. 498, and *vice versa*.

Or deed in
hands of third
person.

Where the bond or deed is in the hands of a third person, the court, on motion, will oblige him to give oyer

Of demanding Oyer.

oyer and produce it. *White v. Earl of Montgomery*,
Str. 1198. Sid. 50.

So if it be in the hands of defendant when he can Or of defendant.
have no pretence to it. *Matison v. Atkinson*, E. 27.
G. 3. B. R. 3 D. & E. 153. N.

If an indenture be lost and there is a counterpart, Or indenture
the court will compel the party to shew his counterpart, lost and there is
and to plead thereto, otherwise they will grant an im- a counterpart.
parlance. Cro. Jac. 426. 2 Kib. 430. Sid. 386.

Oyer may be demanded of letters of administration. Oyer of letters
Garrard v. Early, 2 Wil. 413. of administra-
tion.

But no one is entitled to oyer of a record. *The King* Not of a record.
v. Amery, 1 D. & E. 150.

As of letters patent inrolled though pleaded with a
profert, *ibid*; or of an act of parliament. *Jeffery v.*
White, Do. 477.

Yet in Ld. Raym. 347. 550. if defendant pleads *au-*
ter action pendent in the same court, plaintiff may pray
oyer of the record. But Q.

But if oyer is granted of any instrument of record and How if granted
it is set forth, although the party could not have insisted though not in-
on such oyer, yet he shall be thereby entitled to take the titled to it.
whole instrument as part of his adversary's plea. *Jeff-*
ery v. White, Do. 476.

**B. Of the Time and Manner of demanding and giving Oyer, and the Consequences of refus-
ing it. B.**

Oyer must be demanded before the rule to plead is When oyer to
out. P. R. 278 299. *Hartley v. Varley*, Bar. 329. be demanded.

Or rather before the time for pleading is expired.
Imp. K. B. 244.

Of demanding Oyer.

For if defendant has eight days time to plead, he may demand oyer at any time within the eight days, though the rule to plead is out. 2 Wil. 413. *Duke of Leeds v. Vevers*, Bar. 268.

So it is in time if before a judge's order expires. Imp. K. B. 244. *Barber v. Satchwell*, Bar. 326.

In B. R. oyer may be demanded after imparlance, but not in C. B. Ld. Raym. 970. 3 Kib. 491. 2 Lev. 142.

There cannot be oyer in another term from that in which profert was made. *The King v. Amery*, 1 D. & E. 149. 3 Sal. 119. 1 Mod. 60. But see Lord Raym. 84.

If not in time,
judgment.

If oyer be made after the time allowed, the other party may look upon it as a nullity and sign judgment. *Barber v. Satchwell*, Bar. 326.

What time al-
lowed to plead,
&c. after oyer.

The party craving oyer shall, after delivery of oyer, have as much time to plead or reply, &c. as he had at the time of demanding it. *Powel v. Gay*, Str. 705. R. T. 5 & 6. G. 2.

Whether the rule to plead or the like be out or not. P. R. 301. *Keedam v. Jackson*, Bar. 238. *Simpson v. Daffield*, *ibid.* 254.

Consequence of
refusing oyer.

Wherever oyer is rightly demanded and not granted, the plea is a nullity, and plaintiff may sign judgment. Ld. Raym. 347.

So it must be given in a reasonable time.

What time al-
lowed to give it
in in B. R.

The party who is to give oyer of a deed, is allowed two days for that purpose exclusive of the day on which it is demanded, and if Sunday is the last it is not reckoned: oyer demanded on the Friday evening, party has all the Monday following to give it in; judgment therefore signed on the Monday will be set aside. *Page v. Divine*, 2 D. & E. 40.

Though

Of demanding Oyer.

Though in C. B. two days inclusive of the day of de- In C. B.
marid has been held sufficient time. *Blaxland v. Burges*,
Bar. 245. S. C. Caf. Pr. C. B. 95.

The party of whom oyer is demanded must carry it to the opposite party. *Page v. Divine*, 2 D. & E. 40. Which party to carry it to the other.

Denial of oyer where it ought to be granted is error, otherwise of granting it where it ought not. Sal. 498. Raym. 970.

The demand of oyer is as follows :

A. B. v. C. D. in Manner and
The defendant demands oyer and a copy of the writing obliga- form of de-
tion mentioned in the declaration in this cause, and the condition manding oyer.
thereof under written.

To Mr. T. S. plaintiff's attorney.

Yours, &c.

Or

Plaintiff's demands oyer and copy of the deed mentioned in plea of defendant.

It need not be upon stamp. Imp. B. R. 244. Defendant must pay for oyer and copy 4d. per sheet, or plaintiff may sign judgment.

C. How the Deed must be set out on Oyer, and of the Use of craving Oyer.

Defendant by craving oyer undertakes to set out the whole of the deed verbatim, and if he only set it out in part, the plea is bad : plaintiff may, therefore, in such case sign judgment for want of a plea, or may move the court to quash it, which they will do, nor suffer defendant to amend. *Wallace v. Dutchess of Cumberland*, 4 D. & E. 370. But vide *Weavers Company Quitam*, v. *Forest*, Str. 1241. Bar. 327. How the deed must be set out on oyer.

But where oyer is given of a record set out in declaration, it need not be set out in plea. *Symonds v. Parmerter*, 1 Wil. 97.

To

Of demanding Oyer.

Consequence if
purposely set
out falsely.

To an action of debt on bond defendant, after craving oyer, set it out truly and pleaded payment by the principal, he being a surety; plaintiff replies and put the pleas in issue, and then served defendant's attorney with a rule to abide by his pleas, and gave notice of trial; defendant returned the paper book, setting out false oyer of the bond and pleading as before; on which the plaintiff's enrolled the true condition and demurred.

On the day of argument, which was the last paper day of the Term, defendant's counsel objected to its being argued, because it was the last paper day. But

The court, on hearing the above facts stated, directed an affidavit of them to be made, made a rule nisi for striking out all the pleadings of defendant, that plaintiff should have judgment, and that defendant's attorney should pay all costs; and they intimated a strong inclination to grant an attachment against him. *Ferguson v. Mackreth*, 24 Geo. 3. B. R. 4 D. & E. 371. N.

Defendant
should not ac-
cept imperfect
oyer.

If an imperfect oyer is given, defendant should not receive same by pleading over, but should still insist on want of oyer, otherwise it will be no variance. *Raym.* 1176.

Of the use of
craving oyer.

The only way of taking advantage of a deed being improperly set forth, or of other matters contained therein, &c. is by craving oyer and setting the deed out.

Declaration on bond, plea setting out the condition, which was to perform articles, defendant pleaded performance; plaintiff replied, that by the same articles it was further agreed, &c. on demurrer to replication, judgment for defendant, because plaintiff cannot alledge new matter in the articles without setting them forth on oyer. *Str.* 227. 2 *Saund.* 411.

So if declaration in an action on bail bond by the sheriff of Middlesex be in the plural number as sheriffs, whereas both make but one sheriff, oyer should be craved of the bond and condition, and it must appear on

Of demanding Oyer.

on record, otherwise the court will not presume that it is a bail bond, and no advantage can be taken. *Ld. Raym.* 1135.

Defendant cannot plead that no such letters of administration as set forth in declaration, were ever granted to plaintiff without craving oyer thereof and setting them out in his plea. *Garrard v. Ealy*, 2 *Wil.* 413.

SECTION III.

Of Imparance.

Imparance (*licentia interloquendi*) is a further day allowed to the defendant to answer or plead to the charge or declaration of plaintiff. Imparance what.

When a day is given to plaintiff to declare, it is called *diis datus*; but when after the declaration a day is given to defendant to plead, it is called an imparance.

The intent of imparances is, that defendant may consider the nature of plaintiff's action and of his defence thereto; and also that he may have time to compromise the matter with his adversary: it has therefore been thought to arise from a religious principle, agreeable to the advice given in Saint Matthew c. 5. v. 25. agree with thine adversary quickly whilst thou art in the way with him. Intent thereof.

For the origin and history of imparance, as introduced and used in the courts of K. B. and C. B. see *Boot's* treatise of a suit at law 92. and *Gilb. C. B.* 42. &c. Origin and history.

There are three kinds of imparance:

Different kinds.

1st, A common or general imparance.

2d, A special imparance.

3d, A general special imparance,

The

Of Imparance.

Common or general imparance.

The common or general imparance is nothing more than a further day to plead till the next term, without saving or reserving to the defendant any exceptions or advantages to be taken by him to the writ or count; it is therefore entered of course, and after this general imparance, defendant cannot plead at all in abatement,

Special imparance.

A special imparance is a further day to plead as before, but *salvis exceptionibus tam ad breve quam ad narrationem*; so that after this imparance, defendant may plead in abatement of the writ or count, but not to the jurisdiction of the court; and this special imparance is granted of course in C. B. upon application to the prothonotary.

But by R. E. 5 Ann. in B. R. no special imparance shall be allowed, without leave of the court first obtained.

General special imparance.

The general special imparance, which, in fact, is a still more special one, is (*salvis OMNIBUS exceptionibus et advantagiis quibuscumque*;) after which, defendant may even plead to the jurisdiction of the Court: but this sort of Imparance can only be obtained by leave of the court on motion; and this is discretionary, and must depend on particular circumstances, which are left to the decision of the court. *Grant v. Lord Sondes*, 2 Blac. R. 1097.

In case, therefore, defendant is entitled to an imparance from the too late delivery of the declaration or otherwise, and he would wish to plead in abatement to the writ or count in a subsequent term, he ought not to suffer a general imparance to be entered; but if in C. B. should leave a note with the prothonotary for a special imparance to be granted, which will be done to answer that purpose: but if defendant would plead to the jurisdiction of the court, he ought then to move the court for a general or more special imparance, as the prothonotary cannot grant that: but this cannot be done if defendant has already appeared to the process by attorney, as a plea to the jurisdiction must be *propria persona*. *Ibid.*

The

Of Imparance.

The imparance is entered on the record immediately after the declaration. If a special imparance thus: How entered on record.

"And the said defendant saving and reserving to himself all and all manner of exception as to the afore-said declaration of the said plaintiff, in his own proper person comes and craves leave to imparle to the said declaration of the said plaintiff, until on the morrow of All Souls, and it is granted him, &c."; then follows the plea. *Ibid.*

The time for applying either to the prothonotary or the court for a special or general special imparance is within the first four days of the next term, if declaration be delivered too late in the term for defendant to be obliged to plead thereto. *Grant v. Lord Sondes*, 2 Blac. R. 1094. Time for applying for imparance.

If plaintiff amends his declaration and pay costs, defendant shall have no imparance. *Prac. Reg.* 18. When granted or not.

No imparance after a peremptory rule to plead. *Bar.* 225.

Imparance denied where notice had been served though not indorsed on the declaration. *Bar.* 226, 227.

No imparance in real actions. 8 *Bar.* 2.

None in *quare impedit* after peremptory rule to plead. 1 *Bar.* 181. *Fitzwilliams v. Bishop of Hereford and Others*, Tr. 13 & 14. *Geo.* 2. The court would not grant an imparance though the declaration was delivered after the esoin day (*viz.* 4th June,) there having been a peremptory rule to plead, after which there can be no imparance.

No Imparance where plaintiff is prevented from declaring before the esoin day by an esoin east. *Rooke v. the Earl of Leicester*, 2 D. & E. 16.

In an action for words importing that plaintiff was guilty of the murder of A. B. defendant moved for an imparance till next term, on affidavit that a prosecution

Of Imparance.

tion was carrying on against plaintiff for his murder, (committed on the high seas) in the court of admiralty, and he would probably be tried for the fact before Michaelmas term. The rule to shew cause made absolute. Imparances are in the discretion of the court, and it may be of ill consequence to enter into evidence concerning this murder in the action for words before trial of the fact. *Sibson v. Nivon*, Bar. 224.

Defendant appeared to be a lunatic by affidavits of his wife and Dr. Monro, and a commission of lunacy was produced under seal in Chancery, tested a few days before. Imparance ordered on hearing the attornies. — *v. Higham*, Bar. 225.

When impar-
lance of course,
and what time
allowed for
pleading.

In both courts, if the writ be returnable before the last return of any term, and the declaration not filed, and notice given four days exclusive before the end of such term, defendant is intitled to an imparance.

If writ return-
able last return.

So if the writ be returnable on the last return, in which cases defendant must plead within the first four days of the next term.

Or returnable
one term, and
declaration not
delivered till
next.

But if a writ be returnable one term, and declaration not delivered before the effoin day of the second term, the defendant is not obliged to plead in the same term, but is intitled to an imparance, till the four first days of the next.

Provided de-
fendant be in
court.

But this is upon the supposition that the defendant is in court, by having appeared if the action be not bailable, or by having justified bail, if the action be bailable; for otherwise he is intitled to no imparance, though the declaration be not delivered till the next term after the writ is returnable.

Not otherwise.

In the case of *Rolleston and Scott*, Mich. Term 1793, 5 D. & E. 372, Marryatt moved for a rule to shew cause why the defendant should not have time to plead till the next term. The writ was returnable the last day of Trinity term, when bail were put in, but did not justify till the fourth day of the present Michaelmas term. On which

Of Impar lance.

which day they did justify, and on the same day plaintiff delivered declaration. He insisted that plaintiff ought to have declared *de bene esse*, and by not declaring before the effoin day of the term, defendant was intitled to an impar lance, for which he cited a case in 1st Crompton's Practice, 126. which was in point. But P. Buller Just. as defendant, had not justified bail, plaintiff was not compelled to declare. There is no laches imputable to him for not declaring till all the defendants are in court. He need not declare *de bene esse*, nor is defendant in this case intitled to impar lance. The case cited was in the common pleas.

Where writ is returnable before the last return and declaration delivered in due time, defendant must plead in four or eight days, as before mentioned. See chap. 6. declaration A. B. C.

There are variety of old cases respecting impar lances, but most of them previous to the rules, 5. & 6. G. 2. and 22 Geo. 3. by which the times of pleading in ordinary cases are governed.

If four terms have elapsed since the delivery or filing of declaration, plaintiff must give the defendant a whole term's notice to plead, before he can sign judgment, which must be done by his giving defendant before the effoin day of the term notice of his intention to proceed the next term, by giving a rule to plead; and if defendant does not plead in the course of the term, plaintiff, having first served him with a rule to plead, may sign judgment, for the time does not extend beyond the term.

If four terms have elapsed, what notice necessary to be given.

Therefore where no proceedings were had for above a year, plaintiff two days before Hilary term gave notice of his intention to proceed on the 14th February; two days after Hilary term rule to plead was served, and on the 18th of April, in the course of same vacation, judgment signed for want of a plea, and it was held regular. *Milborne v. Nixon*, 2 D. & E. 40.

The same practice of a term's notice is necessary in all other stages of the proceedings, and from either party when a year has elapsed since the last step taken.

But

Of Imparlane.

An injunction,
an exception to
rule.

But this only extends to voluntary delays by the plaintiff; for if the defendant has delayed the proceedings by an injunction, there is no occasion for a term's notice; and this in both courts. *Hayley v. Riley*, Do. 72. *Besworth v. Phipps*, C. B. 11 Geo. 3. Ibid N. 2 Blac. 784. *Walter v. Stewart*, Blac. 918.

SECTION IV.

Of pleading in Abatement.

(A) Of the Time and Manner of pleading in Abatement.

(B) Of the Affidavit and Signature required in Pleas of Abatement.

(C) Of the Judgment upon a Plea in Abatement.

(D) General Observations and Rules as to Pleas in Abatement.

(E) Of moving the Court to amend Declaration, and of entering the Cassetur Billa.

Pleas in abatement are when the defendant shews cause to the court why he should not be impleaded, or if impleaded, not in the manner and form he now is. As these pleas enter not into the merits of the cause, but are dilatory, the law has laid certain restrictions upon them, as will be seen hereafter.

Pleas in Abatement are threefold:

1st, To the jurisdiction of the court.

2^{dly}, To the person. 1st of plaintiff, and 2^d of defendant.

3^{dly}, To the writ and count.

But it would exceed the limits of this work were we to enlarge upon the different kinds of pleas in abatement,

Of pleading in Abatement.

ment, and the law relating to them. We must therefore refer the reader for such information to Gilbert's Common Pleas, from p. 187, to 250. and to Bacon's Abridg. & Com. Digest. tit. Abatement, and content ourselves with laying down the general practice as to pleading in abatement. And first,

(A) Of the Time and Manner of pleading in Abatement. A.

Pleas in abatement must be pleaded within four days after declaration delivered, or notice of declaration left in the office, provided it be delivered or notice given before the last four days in term; but if afterwards, so that defendant is not bound to plead to it that term, then he may plead in abatement within the first four days of the subsequent term, intitling his plea as of the precedent term in B. R. *Long v. Miller*, 1 Will. 23. *Jennings v. Webb*, 1 D. & E. 278. or by entering a special imparlance. *Smith v. Miller*, 3 D. & E. 627.

By the case of *Doughty v. Lascelles*, it seems absolutely necessary for a special imparlance to be stated on the record, 4 D. & E. 520.

But in C. B. defendant must apply within the first four days of such term to Prothonotary for a special imparlance, which is granted of course, and then plead in abatement. *Threlkeld v. Goodfellow*, Bar. 224. *Napper v. Biddle*, Bar. 334.

Sunday is to be counted one of the four days, unless the last. East. 5 Ann. *Jennings v. Webb*, 1 D. & E. 279. ed. Sunday reckon-

If it be the last of the four days, defendant may file plea on the fifth. *Lee v. Carlton*, 3 D. & E. 642.

In B. R. the four days are both inclusive, so that where declaration is delivered on the sixteenth, the time for pleading in abatement expires the nineteenth. *Jennings v. Webb*, 1 D. & E. 278. *Harbord v. Parigal*, 5 D. & E. 210. Four days reckoned inclusive.

So in C. B. *Biddleston v. Atcherley*, Cook Rep. 64. Imp. C. B. 260.

Of pleading in Abatement.

Not to be pleaded after general imparlance.

Plea in abatement cannot be pleaded after a general imparlance, but it may after a special one.

Defendant pleaded a misnomer in abatement after an imparlance, but it appeared on the record to be thus entered, "and A. B. who was arrested by the name of A. C. comes &c." which the court held tantamount to a special imparlance. Judgment for defendant. *Brewster v. Capper*, Blac. 51. S. C. 1 Wil. 261.

Had the plea began, "and the said A. B. who, &c." it would have been bad. *Ibid.* *Roberts v. Moon*, 5 D. & E. 487.

But in the case of *Doughty v. Lascelles*, 4 D. & E. 520. such a plea as that in *Brewster* and *Capper* was held bad, and court said it could only be pleaded after a special imparlance, which should be stated on the record.

Declaration must be taken out of office.

Before plea in abatement pleaded, declaration must be taken out of the office, or plaintiff may sign judgment.

In what cases judgment may be signed if plea in abatement irregular.

If a plea in abatement be filed after the time allowed, or without special imparlance if requisite, it is as no plea; and plaintiff having stayed till the expiration of the rule to plead, and no other plea being put in, he may sign judgment. *Jennings v. Webb*, 1 D. & E. 278. *Doughty v. Lascelles*, 4 D. & E. 520.

So although no rule to plead has been regularly given, for defendant dispenses with the rule by pleading in abatement. *Brandon v. Payne*, 1 D. & E. 690.

Or even where a rule to plead has been irregularly served, as if it were served before delivery of declaration, for by pleading in abatement he waives the irregularity. *Ibid.*

Must be filed.

A plea in abatement ought to be filed, not delivered. 1 D. & E. 278.

before 9 at night.

A plea in abatement, like other pleadings and proceedings, ought to be filed before nine o'clock in the evening. Where

Of pleading in Abatement.

Where Declaration was delivered 8th May, and plea in abatement delivered at plaintiff's house the 11th at eleven at night, plaintiff signed judgment, and held good. *Jennings v. Webb*, 1 D. & E. 278.

If a man has forfeited his bail-bond, and the court in favour of him stay proceedings thereon, he cannot afterwards plead in abatement to the original action, but must plead in chief. *Sal. 519.*

Can't plead in abatement after assignment of bail-bond.

The court will refuse to order a bail-bond to be cancelled on an affidavit of defendant that he was not the person, but will leave him to his plea in abatement. In this case, the action was brought by *Salter quitam v. Sherfold*, defendant entered into bail-bond by the name of Williams, which was his right name, then moved to have the bond cancelled as above, which was denied. 3 D. & E. 572.

Court will not interfere on motion in a matter pleadable in abatement.

B. Of the Affidavit and Signature requisite.

B.

By 4 & 5 Ann. c. 16. "no dilatory plea shall be received in any court of record, unless the party offering such plea do, by affidavit, prove the truth thereof, or shew some probable matter to the court to induce them to believe that the fact of such dilatory plea is true."

Statute requiring affidavit.

In cases where the matter is pleaded in abatement, which appears upon the record, (as variances,) there needs no affidavit, but otherwise there does. *Ld Raym. 1409.*

When not necessary.

So want of addition requires no affidavit, because it appears on the face of the declaration. *Pract. Reg. 5.*

Cepit in alio loco does not, nor need it be pleaded in four days, for it amounts to a plea in bar. *Bullythorpe v. Turner*, Bar. 353.

Of pleading in Abatement.

A dilatory plea, as a Plea of commorancy, &c. to an indictment, must have an affidavit annexed, or it will be set aside. *Rex v. Grainger*, Burr. 1617.

When necessary. Ancient demesne formerly did not. Raym. 1418. Sed. Pract. Reg. 2. Bar. 187. cont. *Hatch v. Cannon*, 3 Wil. 51. and now held that this plea cannot be pleaded without leave of the court, which must be moved for on affidavit, and which affidavit must be express and particular. *Doe on Dem. Rust v. Roe*. Burr. 1048.

A foreign plea must be put in on oath, that is, it must be sworn that it is true, or such plea is not to be received, Stile. 373. 225. But a plea to the jurisdiction need not be sworn. Carth. 402.

Plea of privilege by a serjeant must have an affidavit. Str. 738.

So a plea of privilege by the clerk of the errors. And the affidavit ought not to be generally that the plea is true, but the particular facts alledged in the plea ought to be verified by the affidavit. *Cunningham v. Johnson*, Say. 19.

So plea of infancy, P. R. 5.

So that there is another executor not named. P. R. 4.

Affidavit made
by attorney suf-
ficient.

An affidavit made by attorney is sufficient. Pract. Reg. 6. *Lumley v. Foster*, Bar. 344. The statute requiring only probable cause to be shewn.

The affidavit ought to be positive, and the words probable matter in the statute only extend to a matter of record, or to some other collateral matter, as to the truth of which there cannot be a positive affidavit. Yet where an affidavit was not positive, but from what was alledged therein it might fairly be inferred that the fact pleaded was true, it was held sufficient. *Pearce v. Davy*, Say. 293.

In

Of pleading in Abatement.

In both courts, a plea in abatement without an affidavit to support the truth of it, is no plea; and the plaintiff may sign judgment *instante*, as if no plea had been delivered. Str. 225. Carth. 402.

Judgment signed, if no affidavit or signature.

So if it be not signed when required by counsel or serjeant. P. R. 282.

¶ Of the Judgment on Plea in Abatement.

¶

In all cases when judgment is given for defendant on his plea in abatement, it is *quod breve*, or *narratio casus* setur;—

Of the judgment.

But judgment for the plaintiff depends upon the circumstance of its being given upon demurrer, or upon issue joined on the plea in abatement.

In the first case, it is *quod respondeat ouster*. In the last it is peremptory, *quod recuperet*.

When respondeat ouster,

The reason of this distinction is, that every man is not presumed to know the matter of law, which he leaves to the judgment of the court; and therefore, where plaintiff *demurs* to defendant's plea, the judgment against defendant upon the demurrer is, that he must answer over. But every one must be sensible when he pleads a fact, whether that fact be true or false; and if he chuses to put the whole weight of his cause upon such an issue, when he might have pleaded in chief to the merits, it is an admittance that he has no other defence; and therefore, if a verdict be against him, the judgment ought to be *final*. *Eichorn v. Le Maitre*, 2 Wil. 366. 2 Blac. Rep. 368. Yelv. 112, Vent. 22. 2 Shaw 42.

When final.

Reason of distinction.

In such case therefore, the jury, at the trial of the issue in abatement, ought to assess the damages. If, however, they should omit so to do, such omission can only be supplied by a *venire de novo* being awarded. *Ibid.* 2 Wil. 366.

Jury to assess damages if final.

Of pleading in Abatement.

Defendant pleaded misnomer in abatement to an action of assumpsit. Plaintiff replied, that he is known as well by one name as the other, and thereupon issue was joined, and verdict for plaintiff; but the jury did not assess the damages. In such case the court cannot order a writ of enquiry to assess damages to supply the omission of the former jury in not assessing them, but a *venire facias de novo* must go, because no attaint would lie against the jury upon the writ of enquiry, were they to give excessive damages, that being only an inquest of office; whereas an attaint would lie against the jury who tried the issue, if they had given outrageous damages. 2 Wil. 367.

If they neglect
so to do, a ve-
nire fac. de novo
to be awarded.

But this is only in such actions which found in damages; for in actions where a specific thing is demanded, as debt, &c. if issue is joined upon a fact in a plea in abatement, and verdict thereon for the plaintiff, the judgment is peremptory, *quod recuperet*.

Consequence of
wrong judg-
ment.

If a wrong judgment be given as in chief, when it was on demurrer, and ought only to have been *respondens oyster*, it will be reversed on error. Str. 532.

Defendant pleaded in abatement *nul tiel person in rerum natura*. Plaintiff replies, that there is, viz. at Westminster, demurrer *inde* and joinder, in which he prays judgment and his damages, which, being in chief, is wrong; for it ought to be that he may answer over. Anon. B. R. 1 Wil. 302.

If plea in abate-
ment concludes
in Bar. or, vice
versa, what
judgment.

If defendant pleads in abatement, and concludes as in Bar. that conclusion makes it a plea in Bar. and in such case judgment final is given, and not merely a *respondens oyster*. So when a plea begins in Bar. though the matter be in abatement, and it concludes in abatement, yet it is a plea in Bar. and thereon judgment final shall be given. Vide Lord Raym. 1018, and authorities there cited; and also Lord Raym. 1205.

A plea of misnomer in abatement must conclude with praying judgment of the bill; praying that the same may be quashed, was held ill on special demurrer. *Hixon v. Binns*, 3 D. & E. 185.

In

Of pleading in Abatement.

In dilatory pleas the greatest precision is required; and if the defendant do not comply with the necessary forms in pleading same, plaintiff may take advantage of it on special demurrer. *Roberts v. Moon*, 5 D. & E. 488.

If defendant demurs in abatement, the court will give final judgment, because there can be no demurrer in abatement; for if the matter of abatement be dehors, it must be pleaded; if intrinsic, the court will take notice, *ex officio*. Sal. 220. Pl. 7. 6 Mod. 198.

What judgment if defendant demurs in abatement.

Upon a judgment of *respondeas ouster*, defendant has four days time to plead; but this is said to be in the discretion of the court. Comb. 19.

What time defendant has to plead after judgment.

D General Observations on pleading in Abatement.

D.

No plea in abatement shall be received after a *respondeas ouster*, for then they might be *in infinitum*.

No plea in abatement after *respondeas ouster*.

Neither court will suffer a plea in abatement amended. Imp. K. B. 242. C. B. 261. P. R. 21.

Plea in abatement not amendable.

A defendant cannot have two dilatories.

In pleas in abatement which relate to the person, there is no necessity of laying a venue; for all such pleas are to be tried where the action is laid. 12 Mod. 125. Carth. 363. Sal. 4.

Plea in abatement set aside on motion, both the plea and affidavits being wrong intitled.

Bad, if wrong intitled.

Defendant was sued by the name of Finis Dinas; he pleaded in abatement that his name was Phineas, and not Finis: but both the plea and affidavit to verify it, were entitled in a cause betwixt Clixby plaintiff, and Finis Dinas defendant. Rule absolute to set aside the plea. *Clixby v. Dinas*, Bar. 348.

Of pleading in Abatement.

After plea, no exception to declaration.

After a plea in abatement, no exceptions can be taken to the declaration. Carth. 172.

Nor can advantage be taken of any errors in the declaration on a plea in abatement, for in such case the defendant ought to demur. 3 Sal. 19.

Ⓒ. Ⓒ. Of moving Court to amend Declaration, and of entering *cassetur billa*.

May move court to amend declaration on misnomer pleaded.

Upon a good plea in abatement plaintiff ought either to take out a summons to amend his declaration, as in case of a misnomer being pleaded he may do upon payment of costs, and this saves the entry of the *cassetur billa*; or he must discontinue his action and begin *de novo*; but if he does not discontinue before he declares afresh, defendant may plead autre action pendent, and it will be afterwards too late to discontinue. Lord Raym. 1014. Knight's case.

The way to discontinue is by entering a *cassetur billa*, as follows:

Of the *cassetur billa*.

Get a roll, enter a memorandum of the term the declaration is delivered, and the plea at the foot thereof, then say, (and thereupon the said plaintiff says, that he cannot deny the said exception of the said defendant above by his plea taken to his said bill, but admits the same to be true; therefore it is considered by the court of our said Lord the King here, that the said bill of the said plaintiff be quashed, &c.

Carry the roll to the clerk of the judgments, if in K. B.; to the Prothonotary in C. B. and docket same; pay 4 d. per sheet in K. B. 8 d. in C. B.; and the *cassetur billa* being marked thereon, carry same to clerk of treasury at Westminster to be filed, and then begin *de novo* with your action.

It seems that plaintiff may confess the plea, and enter a *cassetur breve* upon the roll, and bring a new action, without moving the court for leave, or paying costs. *Allen v. Maxey. Osborn v. Haddock*, Prac. R. 6. But Q. now.

SECTION V.

Of paying Money into Court.

- (A) The Meaning and Origin thereof.
- (B) Of the Manner and Time of paying Money into Court.
- (C) In what Actions and Cases Money may or may not be paid into Court.
- (D) Of the Consequences of paying Money into Court.
- (E) Of bringing a further Sum into Court.
- (F) Of Defendant's refusing to pay the Costs, and how Plaintiff is to proceed.

A. The Meaning and Origin thereof.

A.

When the dispute is not whether any thing at all is due to the plaintiff, but only how much; the defendant before he pleads, is at liberty to move the court for leave to pay so much into court as he thinks is really due. On which the court makes an order that defendant shall have leave to bring into court the sum he moves to pay in; and upon such rule made, if plaintiff accepts such money in full discharge, the sum brought in shall be paid out of court to the plaintiff or his attorney, with costs up to that time, to be taxed by the master, if in B. R.; by the prothonotary if in C. B. But if plaintiff will not accept thereof, the money shall remain in court, and the amount thereof be struck out of the declaration, and no evidence given thereof upon the trial; and if upon trial of the issue between the parties, the plaintiff shall become nonsuit, or the jury shall not assess damages to the plaintiff exceeding the sum so brought into court, then the plaintiff shall have no costs, but shall pay to the defendant or his attorney costs to be taxed, &c. But if the jury give more, then the said sum so paid into court goes towards satisfaction of the judgment, &c.

The

Of paying Money into Court.

The first motion to bring money into court was in Kelyng's time, and introduced to avoid the hazard and difficulty of pleading a tender. Str. 787.

Or rather, perhaps, to prevent litigations and unnecessary expence, by giving defendant an opportunity to settle plaintiff's demand, when he never had it in his power, or had neglected, to make any legal tender.

15. **15.** Of the Manner and Time of paying Money into Court.

How to pay money into court.

No sum, how small soever, can be paid into court without leave obtained on motion. But application to pay money into court requires no notice of motion, or affidavit of facts.

It is done in the manner following:

In B. R.

When there is no doubt but that money may be paid into court, give instructions to counsel for that purpose, with 10s. 6d.; indorse thereon, "Please to move to pay 3l. 10s. into court;" and on his signing it, carry it to the signer of the writs, pay the money to him, who will give receipt for same; then carry brief and receipt to the clerk of the rules, who will draw up rule; pay 7s.; serve copy thereof on plaintiff's attorney, and at the same time deliver your plea.

In C. B.

If the action be such as that there can be no doubt but that money may be paid into court, and if the sum paid in does not amount to more than 5l. apply to the secondary for a treasury rule for that purpose; pay 6s.; take it to protobonotary's, and the clerk will receive the money and put a receipt in the margin, pay 1d. in the pound, 1s. 4d. for receipt, and 2s. for entering plea; serve copy of rule on plaintiff's attorney.

If the sum be more than 5l. then a serjeant's hand to a brief is requisite; and if the general issue be pleaded, he signs it of course: take it to secondary as before, and proceed as above.

But if defendant pleads other pleas than the general issue, give two briefs to serjeant with 10s. 6d.

Of paying Money into Court.

6d. each, one to move to plead double, and the other to pay money into court: take them to secondary as before, and proceed as above.

If in vacation, get a judge's order to warrant the rule.

If the money is to be paid into court *a week after the term ended*, a judge's order is requisite to authorize clerk of rules to draw up rule; but in this case there must be a counsel's hand to a brief for that purpose, as the order states, that clerk of rules be at liberty so to do, on producing a counsel's hand for that purpose. Imp. B. R. 260.

If plaintiff accepts the money in full discharge, he must have costs to the time the money is paid in. For which purpose he must get office-copy of the rule, and obtain an appointment from the master or prothonotary, and serve the same on defendant's attorney to tax the costs. Formerly this was the defendant's duty, but now it is plaintiff's. *Kabell v. Hudson*, 4 D. & E. 12.

How if plaintiff accepts the money.

The agent's taking money out of court is the same as plaintiff himself. 1 D. & E. 711.

But if the plaintiff be not satisfied with sum paid in, he may still take it out of the office (by carrying an office-copy of the rule to the signer of the writs, or prothonotary) in part payment, and may then proceed to trial; and if on the trial he does not recover a greater sum than was paid in, he will be nonsuited, and must pay costs to the defendant.

How if he does not.

The chief clerk's fees upon paying money into court is 20s. for every 100l.; if under 10l., 2s.

When the defendant is intitled to pay money into court, it is a matter of course before plea pleaded, and now even after plea it is perpetually done by obtaining a judge's order for that purpose. No inconvenience ensues

Of paying Money into Court.

ensues to either party from this practice, because if any expence has been incurred, that is ordered to be paid at the time of obtaining the rule. And this tends to the furtherance of justice; for if the defendant pays into court what is really due, the plaintiff ought in justice to take it. *Griffiths v. Williams*, 1 D. & E. 711. 1 Wil. 157. Str. 1271. 1267. Say. 316.

After regular judgment signed, though set aside, defendant cannot have leave to bring money into court. *Burgefs v. Pallamounter*, Bar. 281. *Tidmasb v. Smith*, 285. P. R. 289. Caf, of Pr. C. B. 85.

An offer made by a bill in equity to pay money, shall be tantamount to the money having actually been brought into court, if an action at law be afterwards had under a decree from the court of chancery. *Burr*, 1361.

C. **C.** In what Actions or Cafes Money may or may not be paid into Court.

General principle.

As to the particular cases in which money may be paid into court, the chief distinction is this; That where the sum demanded is a sum certain, or capable of being ascertained by mere computation, without leaving any sort of discretion to be exercised by the jury, the defendant may pay money into court, and have so much of plaintiff's demand upon him struck out of the declaration; and if plaintiff will not accept thereof he shall proceed at his peril. *Burr*. 1120.

On the contrary, where it is an action for damages for any injury sustained, which damages are to be assessed by a jury, money cannot be paid in.

The above is the general rule which governs the cases respecting bringing money into court.

How in particular actions.

But to be more particular. I shall consider in what actions money may or may not be brought into court, agreeable to their nature, in alphabetical order.

Denied

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Denied in an action of account. Anon.

Allowed in any action on a policy of assurance. Stat. ^{Actions on the}
19 G. 2. C. 37. S. 7. _{case.}

In a special action upon the case for damages done to a chaise let to hire by immoderately driving, not allowed. Str. 787.

Nor in an action for injuring common by burning turf. Anon.

Nor in covenant, unless for nonpayment of rent. ^{Covenant.}
Bar. 282. 286. 289. Or where the breach is assigned with equal certainty. Bar. 284.

But in covenant and breach for non-payment of rent, and not repairing, &c. it was moved to bring in so much for the rent; and as to the other breach, that plaintiff might proceed as he thought fit, *et per Trevor*, all the judges have agreed that it is but reasonable to allow it, that it does not differ from debt for rent; for though it be covenant, yet it is for a sum certain. So defendant may move, that upon payment of what shall appear due for rent proceedings as to that shall stay, and the court will refer it to the master. Anon, 1 Wil. 75. Sal. 596.

In covenant the breach was assigned in a sum certain, viz. 11*l.* for not dressing corn, and leave was given to bring in the money on the common rule. Bar. 284.

Not allowed to be paid in on an action of covenant generally, but it may upon any particular breaches assigned for non-payment of rent, or for an increased rent. Blac. Rep. 837. *Fulwell v. Hall, & Walmouth v. Houghton*, Barn. 284.

In covenant on charter party, money paid in on two of the breaches for freight and demurrage. Burr. 1120.

In debt, you cannot bring money into court unless ^{Debt.}
it is for non-payment of rent. Pract. Reg. C. P. 257.
and even that was denied in. Sal. 597. & Bar. 286. So

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So it was refused in debt for goods sold; court saying they never did it in debt. Str. 890.

Debt on bonds.

In debt on bond with a penalty, defendant may bring into court the principal, interest, and costs due on such bond, which shall be deemed a satisfaction, and the court may give judgment. 4 & 5 Ann. C. 16. S. 13.

Before this statute defendant was obliged to bring in the whole *penalty*. Sal. 597.

Bonds for performance of covenants.

This statute does not extend to bonds conditioned for good behaviour, nor for performance of covenants; so that to such bonds money cannot be brought in. *Wright v. Bennington*, Bar. 286.

Annuity bonds.

Condition of a bond was to pay 40*l.* by 5*l. per annum*, and defendant had leave on the statute of Anne to bring the arrears of 5*l. per annum* into court. Str. 814. though in Str. 515. not long before it was denied.

To pay money by instalments.

Condition of a bond was to pay money by instalments, and the court gave leave for defendant to bring the money due by that instalment into court; but not to stay plaintiff from signing his judgment for the penalty incurred by non-payment of the instalment. But although plaintiff in such case may sign judgment for the penalty, the court will not let him take out execution until the payments become due. *Darby v. Wilkins*, Str. 957. But in C. B. on a bond to secure an annuity by instalments, a rule was made absolute to stay proceedings on payment of the 3*l.* the only instalment due and costs. Bar. 288.

The statute of the 4 & 5 Anne, which enables defendants to pay money into court on bonds, ought to have a most liberal construction; and the courts of law and equity ought to exercise their own authority to extend the spirit and reason of it. It meant, that in cases of penalties by way of security, the clear final justice of the case should be attained in the courts of law. *Bonafous v. Rybot*, 3 Burr. 1373. 1374.

The

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The just intent of a bond is to secure principal interest and costs by a penalty, and suffer the debtor at any time to save the forfeiture by performing the intent. *Ibid.*

Bonds conditioned for payment of money by instalments are within this act. *Ibid.*

But if a bond is conditioned for payment of a gross sum at a certain fixed day, and by a subsequent agreement the debtor is allowed to pay it by instalments, provided that he pay it punctually, otherwise the agreement and defeasance to be void; if the debtor does not pay it punctually they are void, and the gross sum is due to the obligee. 3 Burr. 1374.

And unless the debtor pays the whole money, he cannot be relieved from the penalty. *Ibid.*

In debt on bond, with condition to account for money to be received, the court will not stay proceedings upon paying the penalty into court, because damages may be recovered beyond that amount; for the penalty of a bond is not the limitation of damages to be assessed by a jury. *Lord Lonsdale v. Church*, 2 D & E. 388.

The acceptance of interest up beyond the time of the unpaid instalment is no waiver; for the obligee was intitled to receive it as part of the original debt secured by the bond. 3 Burr. 1375.

The whole penalty of a bastardy bond may be brought into court. *Brangwin v. Perrot*, 2 Blac. Rep. 1190. Bastardy bond.

Original defendant obtained judgment of *non pros*, and then brought debt on that judgment for the costs, in which he had judgment by default, and afterwards brought another action of debt on this last judgment, and thereon also signed judgment; which last judgment the original plaintiff moved to set aside on bringing into court the debt and costs of the second judgment. On shewing cause against this rule, the court thought that he himself had given the first provocation, and had been
Debt on judgment.

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been guilty of the first laches, and therefore discharged the rule, but without costs, directing execution to stay, as the money on the former judgment was paid into court in order to discountenance such oppressive proceedings. *Simpson v. Stone*, 2 Blac. R. 785.

Action for dilapidations.

In an action for dilapidation, the court refused to let defendant bring money into court, and said it was like trespass, where you cannot do it, though you may tender amends. *Squire v. Archer*, Str. 906.

Ejectment.

In ejectment for non-payment of rent, the tenant or assignee may pay into court all the rent in arrear and costs, and proceedings shall cease. 4 G. 2. c. 28.

But before this statute it was allowed by the court. Sal. 597. And the reason given was, because the action of ejectment subsists entirely upon the rules of the court.

After judgment against casual ejector, and before any writ of possession executed, the court made a rule to stay proceedings on payment of all rents and costs. Str. 900. *Goodtitle v. Holdfast*.

In ejectment by mortgagee, the mortgagor may bring the principal interest and costs into court, and the court will make a rule to stay proceedings. Str. 413.

Proceedings on a mortgage may be staid by paying mortgage-money, interest, and costs, without payment of a bond. Str. 1107. *Archer v. Snatt*.

Replevin.

In replevin and avowry for rent, defendant allowed to pay it into court. Sal. 597.

The plaintiff in replevin may pay the rent into court, for which the defendant avows. *Vernon v. Wynne*, C. B. T. R. 24.

Where Serjeant Kerby said, he remembered in an action of trespass where the defendant had justified for non-payment of Rent, plaintiff was permitted to pay the rent into court.

In

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In actions on penal statutes, the court on motion Statutes penal. will give leave to pay the penalty into court with costs. *Walker v. King*, Tr. 31. G. 2. & Str. 1217. *Stock, v. Eagle*. 2 Black. 1052.

If the court see reason to suspect that a *qui tam* action is prosecuted merely for the issue money, they will on motion permit it to be paid into court, to abide the event of the suit. *Parker, qui tam, v. Macfarlan*, 3 D. & E. 137.

In trespass, money cannot be brought into court, Trespass. though amends may be tendered. Str. 906.

In an action of trespass of *mesne profits*, money cannot be paid into court. *Holdfast v. Morris*, 2 Wil. 115.

In an action of trespass, assault, and false imprisonment, against a justice, he may, if he has omitted to tender amends, bring money into court, pursuant to 24 G. 2.; but then it must appear, by the production of the previous notice to be given in such case, and an affidavit or the like, that the action is in fact brought against him *as a justice*, for some misbehaviour in his office. *Casbourn v. Ball*, Blac. 859.

In *trover* for money, the court will give leave to Trover. bring the money declared for into court. Str. 142.

But trover being an action for damages, you cannot oblige the plaintiff to accept the thing itself; therefore the goods and costs cannot be brought and paid into court. *Olivant v. Berino*, 1 Wil. 23.

Str. 822. 1191. Goods refused to be brought in in trover;—

But a note was brought in, and the court held it Note brought in. reasonable that goods as well as money should be so. *Tuney v. Clark*, Cas. of Pr. C. B. 59.

If the goods be cumbersome, though they cannot be How if goods brought into court, court will make a rule for plaintiff to shew cause why he should not accept them. *Cook v. Holgate*, Cas. of Pr. C. B. 130. F. R. 260.

Y

Leave

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Leave given to bring a book into court, but this was only granted on the particular circumstances of the case. For in the case of *Harding v. Wilkin*, court refused to grant a rule nisi, on motion to bring a gold watch and diamond ring into court in trover. *Harding v. Wilkin*, Say. 120. *Catting v. Bowling*, Say. 80.

General Rule as to bringing goods into court in trover.

S. P. in C. B.
Whitten v. Fuller,
Blac. 902.

There are several contradictory cases in the books on this point; but the better opinion seems to be, that in certain cases goods in trover may be brought into court; but it must depend on the circumstances of the case; which will be better explained by the following case, where it was held by Lord Mansfield:—"That where Trover is brought for a specific chattel of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damages; there the specific thing demanded may be brought into court: (and Mr Justice Wilmot said, 'This was the more reasonable, as this action of trover comes in the place of the old action of detinue;) but where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it, that may enhance the damages above the real value of the thing; and there is no rule whereby to estimate the additional value, there it shall not be brought in." It is a pity, said Lord Mansfield, that a false conceit should in judicature be repeated as an argument, "The court does not keep a warehouse." What then! What has a warehouse to do with ordering the thing to be delivered to the plaintiff? Money paid into court is payment to the plaintiff. The reason and spirit of cases make law; not the letter of particular precedents. In trover for money-numbered, or in a bag, the court have ordered it to be brought in; yet the jury may give more in damages, they may allow interest, (and in some cases they ought.)

"The reason holds to every other case, where a thing clearly remains of the same value; yet the jury may give damages for the detention."

"I re-

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"I remember its being done twice or thrice in things of small value. It ought to be done to prevent vexatious litigation, which a plaintiff may be tempted to pursue, when in all events he is sure of costs. It ought to be done, because it is the specific relief."

"It ought to be done, because at the trial, when the thing remains in the same condition, there generally is a rule "to deliver it."

"An estimated value is a precarious measure of justice, compared with the specific thing."

"I am aware of the cases where a laced head, a gold watch, a diamond ring, and Chinese pictures, were refused to be brought in."

"But as I think "such motions ought neither to be "refused nor granted of course." They must depend upon their own circumstances. No injury is done the plaintiff if the court should think "he ought not to "proceed for damages beyond the specific thing," because he may still proceed for more at the peril of costs, and so he ought."

But in this particular case, the goods were altered and their value changed. *Fisher v. Price*, Bur. 1364.

The general rule is, as the cases above cited demonstrate, that money can only be paid into court in actions where the damages are liquidated; so that even were defendant to get a judge's order for payment of money into court, where the demand was for unliquidated damages, such payment would be irregular.

General rule as to paying money into court. In what actions.

But if the plaintiff take the money out of court, he thereby waives the irregularity; and should he proceed in the action, he cannot afterwards have a verdict, unless he recover more than the sum paid in. *Griffiths v. Williams*, 1 D. & E. 710.

If paid improperly, how irregularity cured.

Where the plaintiff makes that kind of demand which is substantially for a specific sum of money, the defendant

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defendant may pay money into court. But in torts, where it is a mere question of damages, a chance, as in such cases defendant was originally in the wrong, he must take the event of that chance.

How a carrier
may pay money
into court.

Where a carrier has given notice in printed terms, that he will not be answerable for goods above the value of a certain specified sum, unless paid in proportion, in an action brought against him for the loss of goods above that value, (but for which he has not been paid an extraordinary price,) he may pay into court the sum specified. *Hutton v. Bolton*, 1 C. B. T. R. 299. a.

Must not bring
money on some
counts, and de-
mur to rest.

The court will not give defendant liberty to bring money into court on some of the counts in the declaration, and demur to the rest. For the reason of making the rule to bring money into court is to prevent vexation, and make an end of the cause. *James v. Hopley*, Pr. R. C. P. 256. Cas. of Pr. C. B. 48.

But it may be
brought in on
some, and issue
taken on others.

But money may be paid in on some of the counts, or on some of the breaches assigned, and plaintiff may accept the same, and proceed if he thinks proper on the other counts or breaches.

As in covenant on charter party, where several breaches were assigned, money was paid in on two for freight and demurrage. *Hallet v. E. I. Company*, Burr. 1120. *Baillie v. Cazelet*, 4 D. & E. 579.

So two breaches were assigned in covenant amongst others: 1st, For non-payment of rent: 2^{dly}, For 5^l. an acre advanced rent for ploughing meadow ground; and the court allowed money to be paid into court on these breaches, but not generally. *Fulwell v. Hall*, 2 Blac. R. 837.

What defendant
must plead.

Formerly when a rule was obtained to bring money into court, defendant must have pleaded the general issue, and could not plead double. *Buckley v. Warren*, P. R. 317.

But

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But this strictness has been since dispensed with. And in C. B. the court gave an administratrix leave to bring 5*l.* 5*s.* into court on the common rule with respect to the 7th and 8th counts, (there being nine) and as to the rest to plead the general issue, statute of limitations, and set off. *Hellier v. Hallet*, Bar. 286.

Some times double pleas allowed.

So leave was given to plead bankruptcy to one count, bring money into court on the common rule, and plead the general issue to the other counts. *Hall v. Lane*, Bar. 350.

So leave was granted to bring money into court on the common rule, and plead *plene administravit*, and the general issue to the whole. *Auslin v. Ross*, Bar. 287.

Where there are several defendants, money cannot be paid into court by one only. By Gould, Blackstone, and De Grey, Nares cont. *Kay v. Panchiman & others*, Blac. 1030.

How, if several defendants.

Where one defendant suffers judgment by default, and a second is outlawed, the third shall not bring money into court. *Ibid.*

D. Of the Consequence of paying Money into Court.

D.

Payment of money into court is an acknowledgment of being liable to the action. Burr. 2640.

To defendant.

Payment of money into court is only an acknowledgment by the defendant, that the plaintiff has a right to maintain the action, and is intitled to recover so much as the sum paid. But it does not preclude defendant from taking any objection to the action beyond that sum, although such objection, had not the money been paid in, would have been a bar to plaintiff's suit. *Cox and another executors, &c. v. Parry*, 1 D. & E. 464.

An acknowledgment of the action.

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If plaintiff declares in *indebitatus assumpsit* on an agreement, and defendant pays money into court, he admits the agreement; that is, if the declaration is on the agreement only. But if there are other counts, as money had and received, or the like, he may pay money into court on one of those counts, and then he will not admit the validity or extent of the agreement.

Whether defendant can in any cases, and when, have money back again.

Defendant had brought money into court on the common rule; plaintiff would not accept the same, but proceeded to trial, and was nonsuited. Upon which defendant moved in the treasury, (in C. P.) that in regard as plaintiff was out of court by the nonsuit, he might have the money back, and produced the *posse*. But the judges held, that defendant, by having paid money into court, had admitted that plaintiff was intitled at all events, and therefore defendant could not have the money again. Afterwards plaintiff brought a new action, and the court made a rule that plaintiff might have the money brought in if he thought fit; but if not, that the money brought in should remain to the new action. *Lane v. Wilkinson*, Pr. Reg. 250. Rep. & Cases of Pract. C. P. 36. Str. 1027. *Cox v. Robinson*.

The like resolution in a similar case as above, and leave given for defendant to bring more money in upon the new action. *Dickins v. Tallorwin*, Prac. Reg. 252.

Money was paid into court; plaintiff proceeded, and recovered a less sum: whereupon defendant moved, that he might have the money out of court towards his costs, and it was granted. Anon. Bar. 280. *Rathbone v. Stedman*, Cas. of Pr. C. B. 54. 117.

How, if plaintiff dies.

Money was paid into court, and before trial plaintiff died, whereupon defendant moved to have the money paid back; but the court was of opinion it ought not to be paid back. The courts have not yet gone so far as to order payment in such case to the plaintiff's executor, but it seems reasonable so to do, if the executor is willing to accept it; and after trial, it is plain, the executor

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executor is entitled to the money paid in, though a smaller sum is recovered. Had plaintiff lived, and refused to accept the sum paid in, and had gone to trial and been nonsuited, yet the defendant could not have had the money back out of court, plaintiff being entitled thereto at all events. *Crockay v. Martin*, Bar. 281. Caf. of Pr. C. B. 129. P. R. 255.

So if defendant dies, court will not return money to Or defendant. his executors. *Knapton v. Drew*, Bar. 279.

Judgment was arrested, and consequently no costs Or judgment on either side. But the court ordered the money arrested. brought into court to be paid to the plaintiff. *Fisher v. Kitchingman*, Bar. 284.

Money, if paid into court, though by mistake, is so Or money paid far in the custody of the law, that it cannot be got by mistake. out in any way. It is the only exception where an action for money had and received will not lie for money paid by mistake. *Malcolm v. Fullarton*, 2 D. & E. 645.

In C. B. 37*l.* was paid into court. Plaintiff proceeded, and recovered a greater sum, and then became bankrupt. The assignees moved to have the 37*l.* paid Or plaintiff becomes bankrupt to them; but plaintiff's attorney insisted that as he had been the means of obtaining a verdict, he ought first to be paid his bill and costs. Whereupon the court ordered his bill to be taxed, and the amount thereof to be paid out of the money, and the residue to be paid to the assignees. Supp. to Bar. 11.

To an action by an executor or administrator, the How, in cases of executors or courts formerly would not allow defendant to pay money into court, because the executor or administrator is not liable to costs, as appears by Sal. 596. But in administrators, plaintiff or defendant. the case of *Crutchfield v. Scott*, Str. 796, it was held it might be done, and that the effect of it would be, not to make the executor pay, but only lose his subsequent costs.

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If verdict for
less sum, or a
nonsuit.

The general rule in all cases is, that if the plaintiff chuse to accept the money when it is paid into court, or even before trial, the court will give him his costs up to the time of the defendant's paying money into court; but if he will, notwithstanding, proceed to trial, and fail, he loses all claim to those costs. *Kabell v. Hudson*, 4 T. R. 21. *Stevenson & York*, *Ibid.* 10.

Consequence to
plaintiff if he
proceeds for
further damages

If defendant pays money into court on an action properly commenced by executor or administrator, and the executor or administrator proceeds afterwards, he does it at his peril as to costs. 3 Sal. 105.

As to costs, if
he discontinues.

If plaintiff proceeds in the action after he has taken the money brought in out of court, and then discontinues, he shall not have his costs even up to the time of bringing the money into court. *Berwick v. Symonds*, Say. 196.

But it is now held otherwise; and where money has been paid into court, and plaintiff proceeds afterwards in the suit, and then discontinues, he is intitled to all his costs to the time of the money being so paid; but is liable to pay defendant his costs from that time to the time of discontinuance. See the rule obtained for that purpose. *Hartly & others, v. Bateson & others*, 1 D. & E. 629. 711. Bar. 280. P. R. 255.

In what form
notice to be.

The mode is, to move why the master should not be directed to tax the costs of the plaintiff to the time of paying the money into court, and the defendant's costs from that time to the time of countermanding notice of trial, (i. e. the time of discontinuance whenever it may be) and why the defendant should not pay the balance to plaintiff. Upon which a rule *nisi* will be granted. *Hartley & others v. Bateson*, 1 D. & E. 629.

If proceeds to
trial, and juror
withdrawn.

If the defendant pay money into court, and the plaintiff proceed to trial when a juror is withdrawn, the plaintiff is not intitled to the costs up to the time of paying money into court. For *per Cur.* whenever a juror is withdrawn, each party must pay his own costs. And *per Buller J.* the form of the rule decides this question;

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question; for it was part of the rule, that if the plaintiff would not accept of the money brought into court, with the costs, &c. the said money should be struck out of the declaration: then if it be struck out, that is not considered as part of the declaration. *Stodhart v. Johnson*, 3 D. & E. 657.

In the case of *Griffiths v. Williams*, 1 T. R. 712. After verdict, which was for plaintiff, but only for the exact sum defendant had paid into court, it was moved that the verdict should be set aside, and entered for defendant. The court made the rule absolute, directing, that the plaintiff should have costs to the time of the money being paid into court, and that he should pay the defendant the subsequent costs. If verdict for exact sum paid in.

But since this decision has been impeached, and in the case of *Stevenson & Yorke*, 4 T. R. 10. where, after verdict for defendant who had paid money into court, it was moved on the above authority, that plaintiff should have his costs up to the time of paying the money into court; it was denied, and *per Buller*; though the plaintiff was intitled to the costs up to that time, if the application had been made before trial; yet the party came too late after trial. And that part of the case of *Griffiths and Williams* cannot be supported. *Kabell v. Hudson*, 4 D. & E. 10.

If plaintiff suffers a nonsuit after payment of money into court, he is still intitled to the money paid in. If nonsuited.
Sal. 597. Cas. of Pr. C. B. 36.

Where money was paid into court to attend the event of the verdict, and plaintiff was nonsuited, it was paid back to defendant, and could not be retained in court. Subject to a new verdict. P. R. 253. *Frampton v. Cooke*.

But it is otherwise with executors and administrators; for if plaintiff be nonsuited, after they had paid money into court, it shall be returned to them, because they may be unacquainted with the assets of testor, and Exception as to executors defendants.
not.

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not know whether he owed plaintiff the money or not.
Anon. Caf. of Pr. in C. B. 5.

Taking money
out of court, a
waiver of irreg-
ularity.

If the plaintiff takes the money out of court, he waives every irregularity on part of defendant in paying in the same. As if it be paid in after plea pleaded, or in an action purely founding in damages, in which properly no money can be paid into court. And if upon trial he does not recover greater damages than the sum so paid in and received, he will be nonsuited. *Griffiths v. Williams*, 1 D. & E. 710.

Ordinary costs
of paying in
and taking out,
paid by defend-
ant.

Costs of paying money into court, and taking it out, must be paid by defendant, though the money was tendered after rule obtained to pay it in, and refused by plaintiff before it was paid in. *Cotton v. Perks*, P. R. 258.

Except in cases
of oppressive
action.

Where an action is kept on foot by plaintiff in an oppressive manner, and defendant has been willing to pay the debt, and has taken out summons before a judge for that purpose, and the plaintiff has refused to accept the same, the court will suffer defendant to pay the money into court, and discharge him from the payment of costs. *Johnson v. Houlditch*, Bur. 578. And though defendant may have paid the money into court on the usual rule, which is on payment of costs, he may afterwards move for so much of that rule to be discharged as relates to the costs, which will be granted. *Ibid.*

Costs only al-
lowed of the
counts money
paid in upon.

If a defendant pay money into court upon some of the counts only, and the plaintiff take it out, plaintiff is only intitled to the costs of those counts. For by such partial payment of money into court, defendant admits that plaintiff has a cause of action against him to a certain extent; but that he means to defend himself against the charges contained in the other counts. And the plaintiff by taking the money out of court, precludes himself from all right to the costs upon the other counts. *Baillie v. Cazalet*, 4 D. & E. 579.

Of paying Money into Court.

g. Of bringing a farther Sum into Court.

g.

If defendant has paid a sum into court, the court will not afterwards give him leave to pay more money into court, if issue is joined. *Swan v. Freeman*, Bar. 282.

Whether defendant can afterwards pay more money in.

Nor if plea be pleaded, S. C. Pr. R. 263. Because it may introduce tricks to try whether plaintiff will accept less than is due.

* But where plaintiff would not accept the money brought in and was nonsuited, and afterwards brought a new action, defendant was allowed to bring in a further sum, which, together with the former, was ordered to remain in court upon the common rule on the new cause. *Dickins v. Tallowin*, P. R. 252.

f. Of Defendant's refusing to pay Costs, and how Plaintiff is to proceed.

f.

If plaintiff accepts the money, and does not proceed for further damages, his attorney gets an office copy of the rule, and obtains an appointment of the master or prothonotary, to tax the costs on the copy of the rule, and serves defendant's attorney therewith; and if after taxation defendant does not pay the costs, plaintiff proceeds to deliver his issue and notice of trial, as if no money had been paid in; for he cannot, under the rule, move for an attachment. Str. 1220. And one shilling damages carries costs, on producing the office-copy of rule and the *allocatur*.

How if defendant does not pay costs, when plaintiff accepted money.

If defendant does not pay the costs on payment of money into court, plaintiff may proceed as if no money had been paid in. For he cannot under the rule move for an attachment. *Scarral v. Horton*, P. R. 259. *Hand v. Dinally*, Str. 1220.

In

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In *assumpsit*, the defendant brought 8*l.* into court, on the usual terms of paying costs to that time. The plaintiff took it out and taxed his costs, and served the defendant's attorney, and they not being paid, went on to trial, and obtained a verdict for 7*l.* 18*s.* The defendant insisted that he should have no costs for his subsequent proceedings, since it appeared that he was overpaid. But the court held, that as to the costs it was to be considered as if no motion had been made, the defendant not having fulfilled the terms of her own rule, in which case it is not usual to grant an attachment; but the plaintiff goes on, it being only a conditional rule. They said, they would make him allow upon the execution for the 8*l.* he had taken out of court, and ordered him the *posse*, in order to tax his whole costs. *Hand v. Lady Dinely*, Str. 1220.

But proceedings of plaintiff will be stopt upon the after payment of all costs by defendant. *Bond v. Jope*, Cas. of Pr. C. B. 93.

SECTION VI.

Of pleading in Bar.

- A. Of the Time of pleading.
- B. Of pleading the General Issue.
- C. Of pleading Specially.
- D. Of pleading Double.

A.

The time of pleading.

In B. R.

Upon all process returnable before the last return of any term, if the action be unbailable, or if bailable, and not laid in London or Middlesex, or defendant does not live within twenty miles from London, be must plead to the declaration in eight days after delivery, or filing thereof. But if the action be

In C. B.

Upon all process returnable the 1st, 2^d, or 3^d return of any term, if the plaintiff declares in London or Middlesex, and defendant lives within twenty miles of London, defendant shall plead within four days after such declaration delivered, with notice to plead accordingly without any imparlance. And in case plain-

Of pleading in Bar.

be bailable, and laid in London or Middlesex, and defendant lives within twenty miles of London, then in four days, provided the declaration be delivered or filed, and notice thereof given four days exclusive before the end of the term, and a rule to plead be duly entered. *R. T. 22. G. 3.*

plaintiff declares in any other county, or defendant lives above twenty miles from London, in eight days. *R. Trin. 8. G. 3.*

Provided such declaration be delivered four days exclusive before the end of the term.

If process be returnable on or after the last return, defendant is intitled to an imparlance, of which *vide ante. Sec. 3. Tit. Imparlance.*

In K. B. the four or eight days allowed for pleading are one inclusive, and the other exclusive; but in C. B. both are inclusive. So that if a rule to plead be given the 7th, it is out the 10th, and judgment may be signed the 11th, if demand of plea made in time.

How the days are reckoned.

If the writ be against two defendants, and both are served before the return of the writ, and one of them do not appear in the same term, he must plead as of the term when he ought to have appeared. *Smith v. Muller, 3 D. & E. 627.*

How if two defendants, and one does not appear in time.

But a plea must not be filed (if it be a bailable action) before bail be perfected, as it will be a nullity; and although bail justify afterwards, it does not become a good plea, but plaintiff may sign judgment for want of a plea. *Venn v. Calvert, 4 D. & E. 578.*

No plea till bail perfected.

13. Of pleading the General Issue.

13.

Pleas in Bar are of two sorts, general and special. The general is a direct negation of the charge in the declaration, and is called the general issue, the form of which must be according to the nature of the action, as *non assumpsit, nil debet, not guilty, &c.*

Of the general issue.

In

Of pleading in Bar.

In B. R.

In C. B.

How general
issue to be
pleaded.

Engross it on treble penny stamp paper, and either deliver it to plaintiff's attorney or agent, or enter it in the general issue book, with the clerk of the judgments. Pay 6d.

Engross it on treble penny stamp paper, and either deliver it to plaintiff's attorney, or file it with the prothonotary. Pay filing, 2s.

Need not be
signed.

No general issue need have a counsel's or serjeant's signature to it; nor need any of the following pleas which are tantamount to it.

Nor some other
pleas.

Comperuit ad diem to a bail bond. *Son assault demesne*, *plene administravit*, by an executor or administrator. *Reins per descent*, by an heir. *Nul tiel record*, 2 Blac. R. 816. *Per minas, solvit ad diem*. *Ne unques executor* or administrator. Payment of rent, and *infra etatem*. But this plea ought to have an affidavit annexed to verify it. Pr. Reg. C. P. 5.

C.

C. Of pleading Specially.

Of pleading
specially.

When defendant pleads specially, let the plea be signed by a counsel or serjeant.

In B. R.

In C. B.

How special
plea to be
pleaded.

Engross the plea on treble penny stamp paper, and file it with the clerk of the papers.

It may when engrossed on treble penny stamp paper, either be delivered to plaintiff's attorney, (which is the usual way) or filed with the prothonotary, and then plaintiff's attorney must take it out of the office.

No attorney is to deliver or receive any special plea to be put into the office of the clerk of the papers, or a copy of such plea, before that the same has been put in, and a copy thereof made by the clerk of the papers. M. 2. W. & M.

Must be signed.

All special pleas must have a counsel or serjeant's hand, except those mentioned, *ante* B.; and they are deemed tantamount to the general issue.

So

Of pleading in Bar.

So that *non assumpsit infra sex annos*, must Co. Rep. 41.

Or a general performance of covenants, Bar. 354.

If a plea which ought to be signed by a counsel or serjeant's hand, is not signed, plaintiff may sign judgment; but if there be two defendants, and one pleads the general issue, and the other pleads specially, and both are on the same paper, though the special plea is not signed, plaintiff cannot reject the general issue, and take judgment against both. If he does, the judgment is totally erroneous; and if execution be sued, restitution shall be awarded; but then plaintiff may in such case regularly take judgment against him who pleaded specially. 2 Lil. Reg. 299.

Orfe judgment.

How if two defendants plead differently.

In the King's Bench, the clerk of the papers, with whom all special pleadings are left, makes out copies thereof, signed with his name; and to whom the plaintiff's attorney must apply for a copy in order to draw his replication thereto, unless the replication be of course, and consists in a mere denial of the plea, without alledging any new matter therein, as *nul tiel*, record to a plea of judgment recovered; in which cases the clerk of the papers draws up the replication, and delivers the paper-book to the plaintiff's attorney, with a complete issue.

Special plea must be made up by clerk of papers, &c.

But if the replication is to be special, containing any new matter which must be signed by counsel, the plaintiff's attorney takes the copy of the plea away with him, paying the clerk for it, in order to get the replication drawn; which being done, signed by counsel, and engrossed, is carried and filed with the clerk of the papers; and if further pleadings be had in the cause, the parties alternately take copies thereof from his office, and file their answer thereto until issue is joined between them.

Defendant by leave of the court pleaded *non assumpsit*, and the statute of limitations, and delivered it to the plaintiff's attorney, who made up the issue, and delivered it with notice of trial to the defendant's attorney, who

Consequence otherwise.

who paid for it; the plaintiff's attorney finding afterwards it should have been made up with the clerk of the papers, went and paid him his fees, made up the record and went to trial, and the court refused to set it aside, though the defendant made no defence, for *per Cur.* he was in the first fault in not leaving the pleas in the office. *Thomson v. Tiller*, Str. 1266.

D.

D. Of Pleading Double.

Of pleading double.

In case defendant pleads several matters, a rule for that purpose must be drawn up and served on Plaintiff's attorney when the plea is filed.

In B. R.

Of the manner and time of pleading double.

This is done by giving a brief to counsel, naming your pleas, which be signs of course. Pay 10s. 6d. Then carry it to the clerk of the rules with your plea, who will draw it up. Serve it on plaintiff's attorney.

In C. B.

In certain cases the rule is here obtained, with as little trouble as in K. B. by giving a brief to a serjeant, with 10s. 6d. naming the pleas therein. Then draw up rule with secondary, and serving copy on plaintiff's attorney.

If no such rule to plead double be taken out and signed, plaintiff may, notwithstanding a double plea be delivered or filed, sign judgment. Hil. T. 1794.

In C. B.

But there are many double pleas in C. B. not allowed upon the first motion; but on which a rule nisi is only granted, and then moved again, to be made absolute.

In which cases give brief to serjeants, to move to plead the several matters therein mentioned; upon which a rule nisi is granted, and copy whereof is made out by the secondary. Serve it upon the plaintiff's attorney, and shew him the original rule. When cause is to be shewn give brief to serjeant, (having annexed an affidavit of the service of the rule, and that at the same time the original rule was shewn him,) to make the rule absolute. The plea is then signed by a serjeant, and delivered with the rule annexed. For the first motion pay half a guinea; to make it absolute, one guinea; and to sign plea half a guinea. At the same time it is generally moved for a day or two's time to plead, which is mentioned in the rule, otherwise the time, perhaps, might expire, and judgment be signed.

The

Of pleading in Bar.

The double pleas allowed upon the first motion in C. B. are *non assumpsit* and *non assumpsit infra sex annos*, Bar. 339. *Non assumpsit* and a discharge under the insolvent debtors' act, *ibid.* 343. In trespass *non cul.* and *liberum tenementum alterius*, *ibid.* 336, 340, 351, 356. *Solvit ad diem* and a mutual debt, *ibid.* 340. *Non assumpsit* to the whole, and a tender 360. Damage feasant and under a demise to the plaintiff, Bar. 339. Damage feasant and for rent in arrear, *ibid.* 340. *Non assumpsit*, a set off, and a tender, as of the last term, *ibid.* 353, 357, 360, 366. *Non cepit*, cattle the property of another person not of plaintiff, and *liberum tenementum*, *ibid.* 362. *Non assumpsit* and *plene administravit* generally, *ibid.* 348. *Plene administravit* and a set off, *ibid.* 347. *Ne unques executor* and *plene administravit*, *ibid.* 355, 365. *Non est factum* and *ne unques executor*, *ibid.* 352. *Non est factum* and dures, *ibid.* 359. Not guilty, and a general release, *ibid.* 347, 348. Not guilty, and four guineas paid in satisfaction of all trespasses to such a time, *ibid.* 349. Not guilty, *son* assault and satisfaction for all trespasses, *ibid.* 352. Not guilty, *son* assault and *moliter manus imposuit*, *ibid.* 351, 352, 354. Not guilty, and a justification in trespass, *ibid.* 355, 356, 365. *Non cepit* and to avow the taking, *ibid.* 365. Not guilty to the whole, and a tender of amends, *ibid.* 366. Imp. C. B. 4th Edit. 301.

What double pleas allowed in C. B. on first motion.

If in vacation you apply for this rule, get a judge's summons for leave to plead several matters, (naming the pleas,) who will grant an order thereon upon producing a counsel or serjeant's band in a brief for that purpose; take the judge's order to the clerk of the rules in K. B. or secondary in C. B. who will give you an order: either annex a copy thereof for plaintiff's attorney to the plea or serve him with it. How, if in vacation.

All double pleas must be signed by a counsel or serjeant. Must be signed.

Motion for leave to plead double cannot be made till defendant has appeared. Bar. 331. *Benn v. Geary*. When motion may be made.

The courts will grant leave to plead double, pleading *After judge's* issuably and taking short notice of trial after a judge's order. order for time to plead given. Bar. 338. *Leighton v. Leighton*.

Z

After

Of pleading in Bar.

After paying
money into
court.

After payment of money into court, defendant obtained a rule to plead double, which was set aside with costs. Plaintiff by the rule to pay money into court is confined to the general issue, and no other plea. The motion afterwards to plead double is an imposition on the court. Bar. 339. *Buck v. Warren.*

After rule to
plead expired.

Defendant may move to plead double after rule to plead is out, any time before judgment. Bar. 329. *King v. Boswell.*

Of the origin of
pleading double.

4 Ann. c. 16.
s. 4.

By the 4 Ann. c. 16. s. 4. "Any defendant or tenant in any action or suit, or any plaintiff in replevin, in any court of record, with the leave of the same court, may plead as many several matters as he shall think necessary for his defence;" provided that "if any such matter shall upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or defendant, costs shall be also given in the like manner, unless the judge who tried the said issue shall certify, that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him."

Construction of
the statute.

1st To what ac-
tions it extends.

Upon the first part of this clause it has been determined in both courts, that the statute does not extend to *qui tam* actions; so that in them there can be but one plea. *Law, qui tam, v. Crowther*, 2 Wil. 21.

Nor to any action in a penal statute. Bar. 15. 365. *Lookup v. Frederic.*

Nor to suits where the king is a party, unless for debt immediately owing on revenue, (*vide* 24 sect.) and therefore in *quare impedit* by the king, a rule to plead double was denied. Bar. 353. *The King v. the Archbishop of York.*

So in an information in nature of a *quo warranto*. *Rex v. Newland*, Say. 96.

Of pleading in Bar.

In replevin the court gave leave to plead double, viz. that plaintiff in replevin had not property and a justification as a distress for rent. Bar. 338. *Bird v. Spinks*.

It has also been determined, that the statute of Ann does not extend to plead double matters which shall have different trials, for instance in dower, if the defendant plead "*ne unques accouple in loyal matrimonio*," and a mortgage; for the first matter shall be tried by the bishop, and the other by a jury; and the judge cannot certify if there was no probable cause. *Harding v. Harding*, C. B. Mich. 9 Ann. Com. Rep. 148.

This statute gives the court a discretionary power either to permit or refuse several matters to be pleaded.

Discretionary power in the court.

And formerly the courts, particularly the common pleas, were very strict as to giving such leave, and expected to be even satisfied of the necessity of pleading the several matters moved for, *Crozier v. Starke*, Say. 28. But of late they have relaxed in this respect, and never refuse leave, provided the pleas be not inconsistent and liable to make an incongruity on the record, *Jenkins v. Edwards*, 5 D. & E. 98. Bar. 347.

Formerly more strict.

Now only refused if inconsistent.

Court refused to grant leave to plead *non assumpsit* generally and a tender, *Dougal v. Bowman*, 2 Blac. Rep. 723. 3 Wil. 145.; or *non est factum*, and *solvit post diem*, *Fox v. Chandler*, Blac. 905.; or *non est factum* and *solvit ad diem*, *Arnold v. Baus* 993.; or *non assumpsit* and alienage of plaintiff, *Feron v. Ladd*, Ibm. 1326.; or in dower, *ne unques seise* and *ne unques accouple*, *Anderson v. Anderson*, Ibm. 1157. *Hillier v. Fletcher* 1207.; *non assumpsit* and a release, Bar. 328.; *non assumpsit*, and infancy, Bar. 363.; *solvit ad diem* and *riens per discent*, *ibid.* 332.; *liberum tenementum*, and a justification, *ibid.* 329.; *nil debet* and *nil habuit in tenementis*, the latter may be given in evidence, *ibid.* 333.; not guilty, and *liberum tenementum*, *ibid.* 350.; not guilty, and that plaintiff became bankrupt, *ibid.* 360.; not guilty, and a licence, Bar. 351, 364.; without affidavit, *ibid.* 357.; not guilty, and a release of a particular trespass, *ibid.* 351. though not guilty and a general release, where an affidavit was produced, was admitted. *ibid.*

Instances thereof.

In C. B.

Of pleading in Bar.

But not guilty, and tender of amends allowed. *Martin v. Kesterton* 2 Blac. R. 1093.

All of which cases were in C. B.

In B. R.

In K. B. general issue and statute of limitations allowed, Str. 678.; so tender and eviction, 496.; so *non est factum* and bankruptcy, 871.; so not guilty and the statute of limitations, 889.; so *non est factum* and no request made, 908.; so bankruptcy and *non assumpsit*, 1000.; but not guilty, and a justification not allowed, 876.

So *non assumpsit* to the whole and tender to part held inconsistent. *Maclellan v. Howard*, 4 D. & E. 194.

And on same principle in a late case to an action on Bond, *non est factum* and a tender to part held bad; because if defendant succeeded on first plea, it would appear that there never existed such a bond, and yet that defendant had admitted that something was due on the very same bond, which would make an incongruity on the record. *Jenkins v. Edwards*, 5 D. & E. 98.

Motion to set plea aside for inconsistency, defendant having pleaded *non est factum solvit ad diem* and *solvit post diem* after judges' order; some of the above cases were cited in C. B. and also *Jenkins* and *Edwards* in B. R. per Buller, take nothing by the motion; the above cases are in C. B.; but in this court it is otherwise. *Anon.*

3d, Of the certificate given by the statute.

As to costs of issues found against defendant.

As no affidavit is required in order to plead double, and the court does not go into the materiality of the pleas upon motion to plead several matters, and as defendant may plead as many pleas as he thinks fit, if no two of them are inconsistent, it might frequently happen that defendants would fill the records with a multiplicity of pleas not essential to their defence, and if they obtained a verdict upon one of them, plaintiff would be saddled with the costs of all; to prevent which, by the statute of Ann it is ordered, that the defendant shall himself pay the costs of all such issues as are found against him, unless the judge will certify, that there was probable cause to plead such matter.

The

Of pleading in Bar.

The certificate upon this statute may be made after the trial. When certificate to be made.

Defendants had pleaded to two assaults &c. laid in the declaration, four several matters by leave of the court; on trial, verdict for defendants on two first, and residue for plaintiff without any damages; and there was no certificate from the judge that defendants had probable cause to plead the two last pleas: the court thought they had no discretionary power, but are bound by the stat. 4 Ann. as the judge had not certified and made the rule absolute for costs on the latter pleas. Bar. 140. *Jones v. Davis.*

Four issues were joined in four several pleas in bar to an avowry, three of which were found for plaintiff, and the fourth for defendant, no certificate from the judge that plaintiff had a probable cause to plead the fourth plea, on which defendant moved for costs thereon, after which the judge certified; so the rule was discharged. Bar. 141. *Cremer v. Dent.*

Plaintiff in replevin pleaded two several matters in bar to an avowry by way of prescription, one plea was found for him, and there being no certificate that plaintiff had probable cause to plead the other, the defendant moved for costs according to 4 Ann. The question was, whether these proceedings are within the statute or not: the avowant in replevin being omitted in the words of the statute, rule enlarged, Bar. 144. Afterwards the court held the avowant to be within the intent and meaning of the statute, and made the rule absolute for taxing avowant's costs. *Ibid.* 146. *Bright v. Jackson.* In replevin avowant within the statute.

In assault and battery against A. and B. both pleaded not guilty; and A. by leave of the court pleaded also *sons* assault; verdict for plaintiff against both on not guilty, and for A. on *sons* assault, damages as to B. 9s. Two certificates were signed on the record of *nisi prius* by the judge who tried the cause, one that the assault and battery was sufficiently proved, the other that there was a probable cause for making A. a defendant; A. afterwards moved for costs on the 4 and 5. Ann. c. 16.

Of pleading in Bar.

but the court held his case not within the statute, or the statute 8 & 9 W. 3. and denied costs. Bar. 143. *Barrowclough v. Webster & Smith.*

On a double plea, if either issue be found for the defendant, the plaintiff cannot recover.

If any plea be found for defendant, plaintiff cannot recover.

The defendant, with leave of the court, pleaded *non assumpsit* and *non assumpsit infra sex annos*; to the latter plaintiff replied an original; issue was joined on *nul tiel* record and judgment for the plaintiff; whereupon he executed a writ of enquiry of damages, and did not further proceed on the issue of *non assumpsit*; but as to that entered a *noli prosequi*, the defendant moved to set aside the writ of enquiry; and on shewing cause, the plaintiff insisted that he might enter a *noli prosequi* on the issue of *non assumpsit*, and take his execution on the issue that was found for him, and the defendant insisted both pleas went to the declaration; and if any one issue was found for him, the plaintiff was barred of his action. *per Cur.* it is a judgment only as to part and not upon the whole proceeding, and the enquiry could not be executed before the other issue was tried. The defendant has a double defence given him, and if any one be found for him, he shall be excused; therefore this writ of enquiry is wrong: and if this proceeding were to be allowed, there is an end of pleading double. *Prac. Reg. C. P.* 320.

Defendants pleaded three several pleas by leave, on two of which issues were joined; on the third, for want of a rejoinder, plaintiff signed judgment *quod recuperet*, and took out execution. The court held, that after judgment on the third plea (which was *plene adm.*) the issues on the two other pleas must be tried before plaintiff can recover: if defendant prevails on any, the plaintiff cannot recover; rule absolute to set aside judgment and execution with costs. *Baker v. Barlow & Un, extrin.* Bar. 269.

SECTION VII.

Of the Rule to plead.

Demanding Plea, &c.

So careful is the law to prevent plaintiff from taking any undue advantage of defendants, by obtaining judgment against them unawares, that it not only allows a certain time to plead to the declaration, and obliges the plaintiff to give due notice thereof, but further it compels him to serve the defendant with a rule to plead; and if defendant still neglects so to do, plaintiff must then make a formal demand in writing of a plea, and afterwards search the office to see if one be put in, before he can sign judgment; so that there are no less than three regular notices or warnings given to defendant for him to defend himself against plaintiff's charge or demand.

Having already considered the declaration and the notice thereof, which is the first warning given to defendant to plead thereto, it is only necessary to treat here

A. Of the Rule to plead.

B. Of demanding a Plea.

C. Of searching for a Plea, and signing Judgment for want thereof.

The rule to plead is made out on a common piece of unstamped paper thus : *Of the form of rule to plead.*

In B. R. or C. B.

A. B. against C. D.

Rule to plead.

T. S. Attorney.

1st. January 1793.

Take it in K. B. to clerk of the rules, in C. B. to the secondary, How served. who enters it in a book kept for that purpose, pay 1s. 10d. The rule expires in four days inclusive.

Z 4

Sunday,

Of the Rule to plead.

How the time
reckoned.

Sunday, or any holiday, is reckoned, (except it happens to be the last day;) if it be given on the purification, that is no day.

It may be given any time in term, or within four days after.

In the case of *Oxley v. Bridge*, Do. 67. it was held, that on a rule to plead by a particular day, that day is construed to continue till the *office open* next morning, and that defendant would be regular if he complied with the rule before that time. But very shortly afterwards in the case of *Hafelov and Ansell*, Do. 197. it was adjudged, upon the report of the master, to be the practice, that on a rule to plead, &c. in four days, although it is a common indulgence to allow defendant till the morning of the fifth, yet it is but an indulgence; and if defendant delays till that time, plaintiff may sign judgment; which was since allowed to be the practice in *Thomson v. Ryall*, 4 D. & E. 195.

How, if four
terms are
elapsed.

If four terms are elapsed after declaration delivered, defendant must have a whole term's notice to plead, unless the cause has been stayed by injunction or privilege; in which case, no proceedings having been had in this cause for above a year, it became necessary for plaintiff to give a term's notice of proceeding; two days before Hilary term, plaintiff gave notice of his intention to proceed; on the 14th February, two days after Hilary term, the rule to plead was served; and on the 18th April, in the course of the same vacation, the plaintiff signed judgment, as of Hilary term, for want of a plea; which the court held regular, nor did they look upon the circumstance of the judgment being as of Hilary term of any consequence; for the rule requiring a term's notice when no proceedings have been had in the cause, was only a rule of court, they said, introduced for the benefit of the party, the full benefit of which the defendant had had in this instance; nor would the judgment appear irregular on the record, though signed as of Hilary Term. *Milbourne v. Nixon, and Others*, 2 D. & E. 40.

Where

Of the Rule to plead.

Where time to plead has been given, plaintiff may sign judgment at expiration thereof for want of plea, without giving any rule to plead. *Towers v. Powell*, 1 T. C. B. 88. Where rule to plead not necessary.

The defendant may dispense with a rule to plead, as by pleading either in bar or abatement. *Brandon v. Payne*, 1 D. & E. 690. It may be dispensed with.

Otherwise, generally speaking, such rule is necessary; and even if a rule has been before given, if judgment was not signed as of that term, a new rule should be given to warrant the judgment, signed as of that term, in which it is so signed. *Gil. Rep. 318, Imp. K. B. 232.* Where a new rule necessary.

But this is liable to some exceptions, for where a rule to plead has been given and defendant obtains an order, or is bound by rule of court to plead by a certain time, as for instance, the first day of next term plaintiff may sign judgment on default of defendant's pleading without giving a new rule. *Rep. & Cas. of Prac. C. P. 67. 141. Vide Imp. K. B. 203. Cont.* Where not.

So where plaintiff has given a rule to plead, and has been delayed from signing judgment by an injunction out of chancery, after the injunction has been dissolved, he may sign judgment without giving a new rule. *Bar. 238. Theedam v. Jackson.*

Rule to plead must not be served before notice of declaration, as it would be void. *Grey v. Saunders*, *Bar. 248.* When rule should be served.

If a declaration is delivered *de bene esse*, a rule to plead may be given the same day before defendant appears: but if plaintiff demands a plea, in case the process is bailable, before bail is filed, it is a waiver of the exception to the bail.

Clerk of rules will accept a rule to plead on the es-join day, but it cannot be entered until the first day of term, *Imp. B. R. 232.*

Where

Of the Rule to plead.

How if defendant dies before time expires.

Where defendant dies before the time for pleading expires, or after the rule to plead is out, but before the expiration of the time given him by a judge's order, the suit abates, and plaintiff cannot sign interlocutory judgment and sue out a *sci fa*. *Wallop v. Irwin*, B. R. 1 Wil. 315.

B.

B. Of demanding a Plea.

Of demanding a plea.

When defendant has put in bail or appeared in time, a plea must be demanded in writing of defendant's attorney before plaintiff can sign judgment; and this, although notice to plead be indorsed on the declaration. *Nott v. Oldfield*, 1 Wil. 134. Bar. 276. *Eames v. Jew*.

In B. R. a *latitat* was returnable 22d of April, being the second return, and a declaration was left in the office the 24th *de bene esse*, on the 26th defendant put in special bail, and gave notice thereof: and a rule to plead being entered in the office by the plaintiff's attorney, when that was out, he signed judgment without demanding a plea: *et per Cur.* a plea must be demanded in writing wherever a rule to plead is given and defendant files bail in time, as he has done here; and accordingly judgment was set aside for irregularity, with costs. *Ib.* 1 Wil. 134.

The demand is in this form, in B. R. or C. B.

A. against B.

Form of demand.

The plaintiff demands a plea in this cause, otherwise judgment.
Your's, &c.

H. Attorney for plaintiff.

Mr. C. D. attorney for defendant.

And to be delivered to defendant's attorney, or to the agent in town.

How it must be made.

It will not do on the back of the declaration, for it must be after the delivery of declaration. Imp. K. B. 236.

When.

In B. R. such demand must be made 24 hours before judgment can be signed by default, but at any time after the 24 hours from the time of the demand, judgment may be signed. *Dyche v. Burgoyne*, 1 D. & E. 454.
But

Of demanding a Plea.

But not before time for pleading may have expired.
Bowles v. Edwards, 4 D. & E. 118.

If a plea be demanded on a Saturday, the defendant has 24 hours to plead after demand, exclusive of Sunday. *Solomonis v. Freeman*, 4 D. & E. 557.

And in C. B. if the rule to plead be out before demand made, judgment must not be signed within 24 hours after. *Wooden v. Boyntun*, 1 Blac. 50.

The defendant must be in court before the plea is demanded.

A demand of a plea, therefore, before the defendant has appeared or plaintiff filed common bail for him, is a mere nullity, nor will filing common bail afterwards cure the irregularity. *Cook v. Raven*, 1 D. & E. 636. *Venn v. Calvert*, 4 D. & E. 578.

If plaintiff therefore signs judgment for want of a plea on such an irregular demand, it will be set aside. *Ibid.*

Where declaration is filed *de bene esse* and notice thereof given, if defendant does not file common bail in time and plaintiff files it for him, there is no need to demand plea before signing judgment. M. 10. G. 2. When no occasion for demand.

So if defendant be in custody of the sheriff, no demand of a plea is necessary, but otherwise if he be a prisoner of the court. *Rose v. Christfield*, 1 D. & E. 591.

The demand of a plea is a waiver of bail; care should be taken, therefore, that bail is put in and justified before plea demanded. When it's a waiver of bail.

C. Of searching for a Plea and signing Judgment for want thereof.

Search for plea in B. R. at the clerk of the papers in the book there under plaintiff's name; if not to be Of searching for plea, &c.

Of searching for Plea.

When to search. be found there, search with the clerk of the judgments who keeps the general issue book : in C. B. search at the prothonotary's office in the book there, by defendant's name.

If none found. If no plea to be found, and none delivered in due time, sign judgment by default.

When judgment may be signed. If defendant does not plead within time, a rule to plead having been given and expired, and a demand in writing of a plea having been made, the plaintiff may sign judgment. Tr. 5 & 6 G. 2.

If not signed, whether plea may be put in. But if plaintiff delays signing judgment, and defendant, after the rules are out, and before judgment signed, puts in his plea, such plea must be accepted, nor can plaintiff then enter his judgment ; if he does, it will, on motion, be set aside for irregularity. *Minns v. Baxter*, 1 D. & E. 17.

But Q. whether, although plaintiff has not signed judgment, he may not refuse to accept such plea as he may to receive the paper book under the like circumstances. *Thompson v. Ryall*, 4 D. & E. 196.

SECTION VIII.

Of procuring longer Time to plead.

A. How to be done, and in what Cases granted.

B. When Summons to be taken out, and of the Effect thereof.

C. Of the Terms on which further Time is granted.

D. What are issuable Pleas within a Judge's Order.

E. Of the Consequences of Defendant not pleading a proper Plea according to the Order.

F. Of signing Judgment at the Expiration of the Order.

3. If the defendant cannot be ready to plead by the time the rule expires, he may apply to a judge for a summons

Of procuring longer Time to plead.

summons for further time, serve a copy thereof on plaintiff's attorney; and upon attending the judge, he will make an order agreeable to the circumstances of the case.

Amongst fair practisers a consent is generally procured.

The length of time given to defendant to plead, is entirely in the discretion of the judge; and such order is usually granted upon terms so as not to delay the plaintiff.

Where the cause of action is local and cannot be tried but at the assizes, the length of time to be granted will depend entirely on the interval there is between the application and the commission day of the circuit, for the judge will not extend the order so far as to hinder plaintiff from trying his cause at the then next assizes if he choose it. Of the time usually granted.

If either of the parties live in the country, and the cause of action is transitory, the same doctrine is held as in town causes, allowing for the difference of time required in notices, in order to join issue in them.

But if the defendant has had an order not under particular terms, further time on taking out a summons for the other party to attend may be allowed, on condition that the plaintiff is not prevented from trying his cause in the term of which the writ is returnable, provided the plaintiff had an opportunity of going to trial had the defendant obtained no time at all.

B. When Summons to be taken out, and of the Effects thereof.

B.

A summons for time to plead ought not to be taken out after the rule to plead is out; and if such summons be taken out and served, it is no stay of proceedings. When summons to be taken out, and

Of procuring longer Time to plead.

ings. Bar. 254. *Otwell v. Duett*, Cas. of Pr. C. B. 137. 142.

of the effect of
a judge's sum-
mons as to stay-
ing proceedings.

If the defendant takes out a judge's summons for time to plead, the plaintiff cannot sign judgment till the summons is discharged, Bar. 255. Rep. & Cas. of Pr. C. B. 144. *Brown v. Godfrey*: but this is in case it be returnable before judgment be regularly signed.

For a judge's summons is held to be no proceeding; it stays nothing *unless it be returnable* before the judgment be regularly signed, and if judgment be regularly signed before the summons for time to plead is returnable, the court will not set it aside, especially if defendant has no merits. *Calze v. Ld. Littleton*, 2 Blac. 954. But see *contra*, Bar. 265. *Smithson v. Brough-*
ton.

C.

C. Of the Terms on which Time is granted.

Of the terms on
which time is
usually granted

The terms usually contained in a judge's order on summonses for time to plead are these, "pleading ifsuably, rejoining gratis, taking short notice of trial or inquiry (if necessary) within the term;" but the judge will not hold the defendant to all these terms and conditions on granting the first order, unless the state of the cause require it, or the party summoned before him ask it.

If in a town cause (that is a cause which is to be tried at the sittings in London or Westminster,) the defendant applies for time to plead, the judge will not grant any orders but upon condition, that his attorney undertakes to plead an issuable plea; and pleading ifsuably within the order, means pleading such an issue as the plaintiff might go to trial upon. *Foster v. Snow*, Burr. 782.

D. What

Of procuring longer Time to plead.

D. What are issuable Pleas within a Judge's Order.

D.

An issuable plea is a plea in chief, upon which plaintiff may take issue. Bar. 263.

What an issuable plea or not within a judge's order.

A plea in abatement is not such a plea, because it tends to delay the plaintiff. *Kilwick v. Maidman*, Burr. 59. *Wagstaffe v. Long*, Bar. 263.

Abatement.

Proceedings had been staid on the common terms of defendant pleading issuably, &c. she had then an attorney on record, and now comes and pleads in *propria persona*, "that Ann the wife of David Thomas, who is sued by the name of Ann Thomas, did not undertake, &c.:" it was insisted that this was an abuse of the rule, tending in effect to introduce a plea of coverture; and it was moved to set aside the plea, and that plaintiff might have judgment. The court set aside the plea, and directed her to plead the general issue *non assumpsit* by attorney. *Conwell v. Thomas*, Blac. 724.

Coverture.

But a plea of tender is in B. R. *Ibid.*

Tender.

And now determined to be so in C. B. *Noone v. Smith*, C. B. T. R. 369.

Though it used to be held otherwise. Cal. Prac. C. B. 134. Bar. 337. *Davenhill v. Barritt*.

So to an action on a bail-bond, a plea of the statute 23 Hen. 6. c. 10. that the bond was taken for ease and favour, is an issuable plea within such order. *Dearden v. Holden*, Burr. R. 605.

Plea of stat. 23 Hen. 6.

A general performance is not an issuable plea within a judge's order in an action of covenant. Bar. 354. *Thomson v. Atkinson*.

Performance.

The defendant may plead the general issue, and statute of limitations after an order to plead issuably in both courts. *Rucker & another v. Harnay*, 3 D. & E. 124.

General issue and statute of limitation.

Though

Of procuring longer Time to plead.

Though not long before it was decided otherwise.
Stadbolme, executor, v. Hodgson, 2 D. & E. 390.

Judgment re-
 covered.

A judgment in C. B. no issuable plea in B. R. (when false in fact,) Blac. R. 376. *Heron v. Heron*, and the falsity of it may be proved by affidavit, if attempt is made to set judgment aside.

So in C. B. a plea of recovery in B. R. ordered to be set aside, and defendant to pay costs of the application.
Cave v. Aaron, 3 Wil. 33.

Though the court were not so strongly inclined against such plea in *Lowfield v. Jackson*, 2 Wil. 117.

Judgment con-
 fessed since the
 order.

Defendant having obtained an order for time to plead pleading an issuable plea, &c. pleaded in bar to plaintiff's action (which was upon simple contract,) a judgment confessed upon a bond since the order for time to plead made; plaintiff moved to set aside the plea, but the court on hearing were of opinion, that as there was no particular restraint in the order, and as the bond (whereupon the judgment was confessed) might have been pleaded in bar to this action, the plea must stand.
Hughes v. Pellet, Bar. 330.

Demurrer.

The court of C. B. held a demurrer not to be an issuable rejoinder within the judge's order. *Nesbet v. Farmer*, Bar 168. *Maurice v. Engier*, ib. 271.

But that whether a demurrer was necessary or not might appear, the court ordered plaintiff to join in demurrer, and enlarged the rule to set aside the demurrer till after argument.

But it seems now in C. B. that a demurrer to the merits is an issuable plea within the meaning of an order for time to plead, *Wright v. Russell*, 2 Blac. R. 923. but a frivolous demurrer would not be. *Stonehouse v. Vessel*, Say. 88.

The

Of procuring longer Time to plead.

The defendant obtained time to plead on the terms of pleading an issuable plea, rejoining *gratis* and taking short notice of trial. The action was on a bond conditioned to surrender a copyhold at the request and costs of plaintiff; plea, that the plaintiff never requested; replication a request, and plaintiff then made up the issue, with a rejoinder to the country, which the defendant on delivery struck out, and demurred so near to the assizes, that the plaintiff, expecting a trial, had the record made up, and actually tried the cause before he heard of the demurrer; and now, on motion, the court set aside the verdict: for the construction of these terms put upon the defendant when he asks time to plead, is not to oblige him in all events to join issue to the country, but only where the replication offers a fair issue, and affords no reasonable cause of demurrer, now here the replication not shewing any tender of a surrender, does give such a colour of objection as will warrant what the defendant hath done. *Dewey v. Sopp*, Str. 1185. *Vide Say*. 88.

Good demurrer is an issuable plea:

The defendant having obtained a judge's order upon the terms, amongst others, of pleading an issuable plea, put in a sham demurrer, and the plaintiff's attorney supposing this not to be within the order, signed judgment; upon which the defendant obtained a rule to shew cause why this judgment should not be set aside; and on shewing cause, the plaintiff's counsel prayed, that this rule might be discharged, with costs, *per cur*. There is a distinction between a real and fair demurrer and a sham one; the former is an issuable plea within the meaning of a judge's order; the latter is not, only an evasion of it; and the rule was discharged with costs. *Gray v. Ashton*, 4 Burr. 1788.

Sham demurrer is not.

c. Of the Consequence of Defendant's not pleading agreeable to the Judge's Order.

If the defendant presumes, in breach of his undertaking, to plead a dilatory plea, or such an one as plaintiff cannot argue the law or try the fact on, the plaintiff may sign judgment as if no plea had been pleaded, and give notice of executing a writ of enquiry.

Of the consequence of defendant's pleading a plea not within the order.

A a

So

Of procuring longer Time to plead.

Judgment may
be signed.

So if he plead several pleas, one of which is not issuable, though the others are so, plaintiff may sign judgment for want of a plea. *Waterfall v. Glode*, 3 D. & E. 305.

Defendant, by leave, made two avowries; plaintiff obtained a judge's order for time to plead, pleading issuably, and taking notice of trial for the sitting after term, and within time demurred to the first and pleaded in bar to the last. Defendant signed a *non pros* for want of plaintiff's pleading issuably to both avowries, which the court held regular; but upon payment of costs, pleading issuably to both, and taking notice of trial within term, the *non pros* was set aside. Bar. 314. *Sutton v. Waddilove*.

But to warrant plaintiff signing judgment, the plea should appear on the face of it to be a dilatory plea, for if it goes to the substance of the action, however informal it may be drawn, or however bad in itself, plaintiff cannot treat it as a nullity and sign judgment, but should demur. *Thellupor v. Smith*, 5 T. R. 152. See also *Coppin v. Carter*, 1 T. R. 462.

§. Of signing Judgment at the Expiration of the Order.

Of signing judgment at expiration of the order.
How the time reckoned.

If a judge gives an order for a month's time to plead to defendant, it is a lunar month, or four weeks; for a month in law is always a lunar month, except in *quare impedit*. In all temporal cases it is a lunar month, in ecclesiastical a solar. *Talbot v. Linfield*, Blac. 450. *Tullet v. Linfield*, Burr. R. 1455.

The time to plead under a judge's order is reckoned inclusive of the day of the date of the order, but exclusive of the day on which it expires. So that an order for a week's time to plead obtained on a Saturday expires on the morning of the following Saturday: and in C. B. plaintiff may sign judgment at the opening of the office in the afternoon of that day. *Kay v. Whitehead*, 2 C. B. T. R. 35.

But

Of procuring longer Time to plead.

But in a note to that case it is said, that in B. R. plaintiff cannot sign judgment till after 24 hours have passed from that time.

The defendant had an order by consent from a judge for eight days' time to plead, and at the expiration of the eight days, the plaintiff signed judgment without giving a rule to plead, *et per cur.* the judgment is regular. Rules are only to give the parties notice when they are expected to plead; here the defendant's praying time to plead, excludes any presumption that the plaintiff has not given him such notice. *Strankie v. Wilkes*, Mich. 7 G. 2. in B. R. In *C. B. Towers v. Powell*, 1 C. B. T. R. 88.

Rule to plead not necessary.

SECTION IX.

Of moving to abide by the Plea.

It is a common practice, in order to gain time and get over a term, for defendant to protract plaintiff's proceedings as much as possible by special pleadings, and afterwards when the issue or paper-book is delivered, to strike them out and plead the general issue, or to strike out the similitur in the replication and add a demurrer: to prevent which, it is customary for plaintiff, when he suspects defendant's plea to be a sham one, to apply for a rule to compel defendant to abide by his plea pleaded, or to plead immediately some other which he will abide by, which is done in the following manner:

Use thereof.

If you wish to get rule for defendant to plead another plea on the morrow, draw up brief for counsel to move for defendant to abide by his plea already pleaded, or plead such other as he will abide by, fee 10s. 6d., carry it to the clerk of the rules, who will draw up rule accordingly, pay 5s.; but if you want him to plead instantly, it is a motion in court.

How to be done in term.

When the rule is obtained, leave copy thereof at defendant's attorney's house.

Of moving to abide by the Plea.

In vacation.

In vacation a judge at chambers may make an order, that the defendant shall plead such a plea as he will stand by. Foster v. Snow, Burr. 782.

How, if orders not obeyed.

If he does not plead a new plea, proceed by making up the the paper-book.

When to plead *instante*.

The court will order defendant to plead *instante* towards the end of the term, when otherwise there might not be sufficient time to give notice of trial.

But the time allowed by the common rule to plead should be expired. So also on frivolous demurrers. N. on R. 5 & 6 Geo. 2. Imp. B. R. 285.

Of the costs.

In Court of B. R. costs of this motion are allowed, whether defendant abides by his plea or not.

If no new plea, the first stands.

The defendant pleaded a sham plea, and plaintiff obtained a common rule that the defendant should plead peremptorily on the morrow, and that such plea should not be waived, and served it on the defendant's attorney, who taking no notice of it, the plaintiff after the day was out signed judgment, which the court, on the master's report, held to be irregular, the first plea standing, if the defendant did not lay hold of the opportunity given him of altering it, whereby the plaintiff has the benefit of his motion. *Webb v. Holt*, Str. 1234.

What to be pleaded after such rule or order.

After a rule to abide by a special plea, (as where defendant had pleaded judgment recovered,) or plead such other plea as defendant will abide by, he cannot plead the general issue; and if he should plead any other special plea, or any double plea as the general issue and plea of set off, it will be deemed as no plea, and plaintiff may sign judgment. 1 D. & E. 693. *Hare v. Lloyd*, and in notes *Prout v. Dewar*.

But he may, after such rule, plead the general issue, and give a notice of set off. *Cockran v. Robertson*, *Ibid*.

SECTION X.

Of the Pleas of Tender and Set off.

1. *Of the Plea of Tender.*

A. What constitutes a good Tender.

B. In what Actions a Tender may be pleaded.

C. When and how to be pleaded, and of the Consequences of such Plea to the Parties in the Suit.

D. How Defendant may avail himself of a Tender if made before Action, though by the Teste of Writ or Memorandum of Bill it appears since.

A tender may be made to any person in whom, either as party or privy, the right to the thing tendered is, as a tender to an executor, even before probate if he afterwards proves the will, or to an assignee of a bond. But it is said, that tender of amends to a bailiff who has distrained beasts damage feasant, is not good, because as a mere servant he has no power to deliver the beasts. But *Q. 9* Blac. Abridg. 10.

To whom tender to be made.

Payment of a debt to the plaintiff's attorney is good payment, even after he was privately changed and plaintiff had employed another attorney, because he ought not to have been changed without leave of the court, *Pruell v. Little*, 1 Blac. 8. : though payment to the attorney is good, payment to his agent is not so. *Yates v. Freckleton*, Do. 624.

But a tender to an attorney can only be good under particular circumstances, as where the attorney is authorized to settle the business, and writes to defendant previous to suing out writ, warning him of the action, unless he pays him the money, or the like ; for a tender must be made before the writ is sued out ; and though plaintiff may have generally employed any one as attorney,

Of the Plea of Tender.

ney, yet it does not follow that he may give him authority in that particular action.

How to be made.

In order to constitute a legal tender, the money should actually be shewn to the person to whom it is tendered; but this form may be dispensed with by the party to whom tender is made.

As where defendant said, he had the money in his pocket, and plaintiff answered, you need not give yourself the trouble of offering it, for I will not take it. *Douglas v. Patrick*, 3 D. & E. 684.

Nor is it the business of defendant to count the money, if he tenders it in a bag, or untold, it is good; it is receiver's business to tell it. 5 Co. 115. Bull. Ni. Pri. 155.

What a good tender.

It is generally laid down, that a tender in bank notes is not a good tender, though rendered so if defendant offers to get cash for the notes, *Noyes v. Price*, Sitts. 16 G. 3.: but if the question were to come directly before the court (which it never yet has,) I conceive they would be inclined to consider bank notes in such a case as money.

At all events, if bank notes are offered and no objection made on that account, it is a good tender. *Wright v. Reed*, 3 D. & E. 554.

15. In what Actions a Tender may be pleaded.

How in case of joint demands.

If A. B. and C. have a joint demand, and C. has a separate demand on D. and D. offers A. to pay him both the debts, which A. refuses without objecting to the form of the tender on account of his being only entitled to the joint demand, D. may plead this tender in bar of an action of the joint demand, and should state it as a tender to A. B. and C. *Douglas v. Patrick*, 3 D. & E. 684.

It

Of the Plea of Tender.

It was formerly held, that a tender could not be pleaded, to a *quantum meruit*, because the demand was uncertain, *per Holt. Giles v. Hart, Ld. Raym. 255.* To a quantum meruit.

But since determined otherwise on demurrer. *Johnson v. Lancaster, Str. 576.*

By stat. 4 & 5 Ann. c. 16. s. 12. the plea of *solvit post diem* is given to an action on a bond, but a tender and refusal of principal and interest at a subsequent day cannot be pleaded, as not being within the equity of the statute; for such construction would be prejudicial, as it would empower the obligor at any time to compel the obligee to take his money without notice. *Underhill v. Matthews, C. B. Bull. Ni. Pri. 171.* Stat. 4 Ann. in debt on bond.

Tender of amends before action brought, may be pleaded to involuntary trespasses, 21 Jac. 1. c. 16.; but not to voluntary ones, as taking away goods. *Baile v. Vivas, Str. 549.* Stat. 21 Jac. in trespass.

To an avowry for damage feasant in replevin, tender must be pleaded to have been made before impounding, for it is not within the statute of James I. which goes only to trespass, where tender of amends may be pleaded to have been made at any time before action brought. *Lutw. 1596.* In replevin for damage feasant.

If a man avow taking the cattle damage feasant, and the plaintiff pleads tender of amends and a refusal, he shall recover on a verdict for him, damages for the detaining and not for the taking, because the taking was lawful: but if the tender were before the taking, the taking is tortious; if after impounding, neither the taking nor detaining is tortious, and after the avowant has had return irrepleviable, yet if the plaintiff make sufficient tender, he may have detinue for the detainer after. *Sal. 584. 8 Co. 147. Bull. Ni. Pri. 60.*

To an avowry for rent, the plaintiff may plead a tender and refusal without bringing the money into court, because if the distress were not rightfully taken, the defendant must answer the plaintiff his damages. *Bull. Ni. Pri. 60. Sal. 584.*

A a 4

But

Of the Plea of Tender.

For rent.

But if the distress were rightfully taken, the plaintiff cannot plead tender of rent and costs in bar of an avowry for rent in any case, unless the distress was made of corn, grass, &c. growing on the premises, and then such plea is given by 11 Geo. 2. c. 19. s. 9.

In trover.

Where defendant came into possession of goods wrongfully, no tender is necessary of freight, &c. paid by him in order to enable plaintiff to maintain his action. *Lempriere v. Pasley*, 2 D. & E. 485.

Stat. 11 G. 2.

Sometimes particular statutes authorize a tender of amends where otherwise it would not have been allowable; as 11 Geo. 2. c. 19. s. 20. tender may be made for any unlawful act done by a person who has distrained for rent justly due.

17 G. 2.

So 17 Geo. 2. c. 38. s. 10. in distraining for money justly due for relief of the poor.

24 G. 2.

So 24 Geo. 2. c. 44. s. 24. in all actions brought against justices for any thing done in execution of their office.

But the statute only means actions of tort. *Filtham v. Terry*, East. 13 Geo. 2. B. R.

In actions against justices

A justice having pleaded tender of amends according to the above act, the plaintiff obtained a rule for the defendant to bring the money into court for the plaintiff to take the same upon discontinuing his action. *Lawrence and Cox*, Hil. 33 Geo. 2. B. R. Before a justice is allowed to pay money into court on an action of false imprisonment, it must appear that he is sued as a justice for some misbehaviour in his office, 2 Blac. R. 859. this may be by the notice and affidavit of the justice having been served therewith.

23 G. 3.

So by 23 Geo. 3. c. 70. s. 30. tender of amends allowed to be made and pleaded by excise officers for any offence committed *quod* excise officers; and 24 Geo. 3. c. 70. gives like privilege to custom-house officers.

Of the Plea of Tender,

Ⓒ. When and how to be pleaded, and of the Consequences thereof to the Parties in the Suit.

Ⓒ.

Formerly there was as much strictness preserved in the time of pleading a tender as in a plea in abatement, viz. within four days from declaration; but latterly the courts have considered it as a fair, honest, issuable plea, and have permitted it to be pleaded even after judges order for time to plead has been obtained. *Kilwick v. Maidman* B. R. Burr. 59. *Moore v. Smith*, 1 C. B. T. R. 369.

At what time tender to be pleaded.

But yet it should not strictly be pleaded after an im-
parlance.

Not after im-
parlance.

The plea, therefore, should be pleaded as of the same term with declaration, unless the declaration be delivered or filed so late, that defendant is not obliged to plead to it that term, and then it may be pleaded of course within the first four days inclusive of the next term entitled as of the preceding term; and even afterwards, under particular circumstances, court will, on motion, suffer it to be pleaded as of the last term. *Tid. 248. Bayler v. Houldston*, Bar. 351. *Smith v. Philips*, ib. 354. *Browne v. Hagon*, ib. 357. *Asbberts v. Hughes*, ib. 359. *Pitfield v. Mercy*, ib. 362.

As of some term with declaration.

After demurrer to declaration, plaintiff obtained judge's order and amended; defendant then moved for leave to plead tender as of last term, or that plaintiff might make his declaration of this term. Rule absolute. *Roberts v. Hughes*, Bar. 359.

After demurrer.

A tender may be pleaded generally to the whole declaration; but defendant cannot plead *non assumpsit* to the whole, and a tender as to part. *McLellan v. Howard*, 4 D. & E. 194.

How to be pleaded.

The

Of the Plea of Tender.

The usual way therefore is to plead as to all, except the sum tendered *non assumpsit*, and as to that sum a tender.

But defendant may plead not guilty, and a tender of amends in trespass. *Martin v. Kesterton*, 2 Blac. 1089. *Gerring v. Manning*, Bar. 366.

It is not sufficient for plea to state that defendant was ready, and had always been ready to pay the debt, but it must set forth an actual tender. *French v. Watson*, 2 Wil. 74.

Of the uncore
prist.

Where there is no fixed time for payment, defendant should not only shew a tender, but plead that he was always ready from the time of making the promise to pay, and yet is ready; and not merely from the time of making the tender. But where by agreement, payment was to be at a fixed time, tender at and always ready from that time is sufficient. *Giles v. Hart*, Sal. 622. *Ferrand v. Pearson*, Bull. Ni. Pri. 156. *Sweatland v. Squire*, 2 Sal. 623.

If administrator pleads that he has been always ready since the death of intestate, it is bad. It should be, that his intestate was at all times, during his life, from the making of promise, ready to pay; and that administrator had always been ready since his death. *Clemens v. Reynolds*, Say. 18.

If a tender at the day of corn, or of any other goods of a perishable kind, be pleaded, with a refusal, there is no need to plead *uncore prist*. 9 Rep. 79. *Peytoes Case*.

So in covenant, the damages not the debt being the thing in demand, it need not be pleaded with an *uncore prist*. *Carter v. Downish*, 1 Show. 137. Bull. Ni. Pri. 166.

In pleading a tender, defendant should state such particulars as to shew that he has done all that could be done on his part to accomplish what by his agreement he was bound to do. *Lancashire v. Killingworth*, Sal. 624.

Though

Of the Plea of Tender.

Though a tender is made, and the plaintiff refuses the money, yet the tender cannot be pleaded in bar of the action, either in debt or *assumpsit*, but in bar of the damages only; for the debtor shall nevertheless pay his debt. Lord Raym. 254. *Giles v. Hart*.

And there is a difference in pleading a tender in debt and *assumpsit*; for in debt the damages are but accessory, but in *assumpsit* they are the principal. Therefore in debt defendant may plead in Bar of the damages; but in *assumpsit*, he ought to plead always ready with a *profert in cur.* and demand judgment *de ulterioribus damnis*. *Giles v. Hart*, Sal. 623.

But although such tender and refusal were made, yet if at any subsequent period plaintiff has made a fresh demand, and defendant has on his part refused to pay, the operation of the former tender is done away, and plaintiff may reply to such plea of tender, the subsequent demand and refusal, and if proved be intitled to a verdict, How, if fresh demand made.

A tender of money must be pleaded with a *profert in curia* of the money; and if the same be not paid into court, plaintiff may sign judgment. *Pether v. Shelton*, Str. 638. *Bray v. Booth*, Bar. 252. Of the profert in curia.

In B. R.

The money tendered is paid to the signer of the writs, Messrs. Provost and Webb, who give a receipt for the same in the margin of the plea, which is to be signed by counsel, and filed with the clerk of papers.

In C. B.

Money is paid to one of the prothonotaries, who gives a receipt for same in margin of draft of plea. Pay 8d. per sheet, and 1s. 4d. for receipt. No rule is drawn up to pay money into court, but plea is filed. How money to be paid into court on a plea of tender.

Money brought into court on a plea of tender cannot be taken out by defendant though he obtains a verdict; for it is the same as if money had been brought in on the common rule, to strike it out of the declaration. *Cox v. Robinson*, Str. 1027. Of taking the money out.

After

Of the Plea of Tender.

After a plea of tender, and money brought into court, the court will not admit the defendant to withdraw his plea, and plead the general issue. *Reeves v. Probart*, Bar. 330.

Plaintiff may either admit the tender or not. If the latter, he should not take the money out of court; for by taking it he admits the same to be right, and judgment is given for defendant to go quit as to that plea. But if he admits it, and goes for further damages, on the ground that the tender was not sufficient to cover his demand, he may take the money out of court, enter an acquittal as to the tender, or confess the same in his replication, and proceed on the general issue for the residue. *Cliff v. Jones*, Ld. Raym. 1774.

If he admits the tender, and enters an acquittal without going for further damage, he must pay defendant his costs. *Hill v. Williams*, Bar. 357.

D. **D.** How Defendant may avail himself of the true Time of the Tender, though subsequent to *Teste* of Writ, or the like.

If a tender be in fact made before the bringing of the action, though by the *teste* of the writ it may appear to have been afterwards, (as if tender in vacation and writ tested of preceding term,) the exact time when writ in fact was sued out may be shewn in pleading, or sometimes given in evidence contrary to the *teste*; for *factio cedit veritati*. See *ante* chap. 3. Sec. 1. E. 8.

But it is said, that if bill be filed on same day tender was made, though subsequent thereto, defendant cannot avail himself by pleading the prior tender.

A tender was made actually in the term, and before a bill filed against defendant, bill was afterwards filed same day, and a summons taken out before Mr. J. Buller, to entitle the bill, (which was of Hilary term generally,) the day it was actually filed. Mr. J. Buller said, that it would not at all assist defendant, for he
could

Of the Plea of Tender.

could not take advantage of it in pleading, there being no fraction of a day. Hill. 30. Geo. 3. Imp. B. R. 3 Ed. 266.

But if by a special memorandum defendant could avail himself of the tender, court will order a general one to be altered to the true day when bill was filed, or writ sued out. C. B. *Potts v. Creswell*. Bar. 343. *Smith v. Key*, B. R. Str. 638.

2. Of the Plea and Notice of Set off.

A. Its Origin and Nature.

B. Of the Demands and Actions within the Statutes of Set off.

C. Of the Parties between whom there may be a Set off.

D. Of the Form of Notice of Set off, and its Incidents.

That cross demands should be set off against each other by deducting the less sum from the greater, and the difference be the sum justly due, seems clearly agreeable to the principles of natural equity. But *positive law*, for the sake of the forms of proceeding and convenience of trial, has said, that each must sue and recover separately in separate actions.

3.
No set off at common law.

At common law, therefore, whenever there were mutual debts unconnected, each party was driven to his suit.

Courts of equity also followed the same rule, for otherwise they would have stopped the course of law in all cases where there was a mutual demand.

The natural sense of mankind was first shocked at this in the case of bankrupts, and it was provided for by 4 Ann c. 17. and 5 G. 2. c. 30. that mutual demands should be balanced. Where there was no bankruptcy, the injustice of not setting off, (especially after the death of either party,) was so glaring, that parliament interposed by

But remedied by statute.

Of the Plea and Notice of Set off.

by 2 G. 2. c. 22. and 8 G. 2. c. 24. ; but the provision does not go to goods or other specific things wrongfully detained ; and therefore neither courts of law nor equity can make the plaintiff who sues for such goods, pay first what is due to the defendant, except so far as the goods can be construed a pledge, and then the right of the plaintiff is only to redeem. Hence it is that courts of law have inclined of late years so much in favour of liens. See the case of *Green & Farmer*, Burr. 2220.

15. 13. Of the Demand and Actions within the Statutes of Set off.

Of the demands
and actions
within the sta-
tutes of set off.

By the 2 Geo. 2. c. 22. "Where there are mutual debts between plaintiff and defendant, or if either sue or be sued as executor or administrator, where there are mutual debts between testator or intestate and the other party, one debt may be set against the other ; and such matters may be given in evidence on the general issue, or pleaded in bar, as the nature of the case shall require ; so as at the time of pleading the general issue, where any such debt is to be insisted upon in evidence, notice be given of the particular sum or debt so intended to be insisted on, and upon what account it became due."

Stat. 8 G. 2.

In the construction of this statute, the then two chief justices, Lord Hardwicke and Eyre, differed with regard to setting off debts of superior nature against inferior, and *vice versa*, which occasioned the 8 Geo. 2. c. 24. Blac. 871. whereby "mutual debts may be set off against each other, notwithstanding they are of a different nature, unless where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty ; and in all such cases, the debt intended to be set off shall be pleaded in bar ; in which shall be shewn, how much is truly and justly due on either side : and in case plaintiff shall recover, judgment shall be entered for no more than shall appear to be due after one debt set against another."

By

Of the Plea and Notice of Set off.

By the general issue mentioned in statute is meant any general issue, (as *non est factum* in covenant,) according as the action may be. Bull. Ni. Pri. 181.

The court have been gradually extending this equitable remedy of set off: in the outset of a suit, they compel the plaintiff to make a set off in the affidavit to hold to bail, and will not suffer him to swear to one side only of the account. So in costs at the close of the suit, the same reason, and the same analogy, extend to set off mutual judgments, and thereby narrow the greater execution in whatever court it happens to be.

The remedy of set off extended.

As to affidavits to hold to bail.

So as to costs and judgments.

Thus in C. B. court ordered a judgment obtained in B. R. to be set off against a judgment obtained in C. B. and on payment of the balance, execution to be stayed. *Barker v. Brabam*, Blac. 869.

So in all cases where the parties have mutual demands of costs against each other, court, on motion, will order them to be set off. See the cases *Schoole v. Noble* and others, 1 C. B. T. R. 23. *Nunez v. Modigliani*, ib. 217. *O'Connor v. Murphy*, ib. 657.

Costs set off.

So costs of one judgment may be set off against debt and costs of another. *Thrustout dem. of Barns v. Crafter*, Blac. 826.

Nay, so far have the courts exercised this equitable jurisdiction, that in the case of *Mitchell and Oldfield*, 4 D. & E. 123. where the plaintiff had recovered a judgment against defendant, and the defendant had also recovered in another action against plaintiff and another; upon a motion to set off the debt and costs of the latter against the judgment of the former, although the one was a debt due to plaintiff alone, whereas the other was the joint debt of plaintiff and another to the defendant, and although it was observed that it was not such a debt as could be set off, yet court made the rule absolute on defendant's undertaking to pay plaintiff's attorney's bill in the first action, who had a lien on the judgment for his costs; Ld. Kenyon saying, that this case did not depend on the statutes of set off, but on the general jurisdiction

Even a separate judgment set off against a joint one.

Of the Plea and Notice of Set off.

diction of the court over the suitors in it, that it was an equitable part of their jurisdiction, and had been frequently exercised.

Where the debt is of an equal sum, there the action is barred; but if it be for a less sum than for what the action is brought, the defendant must pray to have it set off. *Bull. Ni. Pri.* 179.

Jurisdiction of court not affected by set-off reducing debt.

A set-off reducing plaintiff's demand under 40s. does not affect the jurisdiction of the superior courts. *Pitts v. Carpenter*, 1 Wil. 19. S. C. Str. 1191. *Heaward v. Hopkins*, Do. 448.

One part of set off may be good though not another.

Two parts of a plea of set-off are as two counts in a declaration, and if one part be good, a general demurrer to the whole is bad. *Dowland v. Thompson*, Blac. 910.

No set off in actions founded on torts.

The statutes authorizing a set off only extend to actions founded on contracts either express or implied, but not to torts or actions of wrong, as detinue, trespass, and the like; nor to replevin, for that is not an action but a remedy without suit. *Abfolom & Knight*, Bull. Ni. Pri. 181.

But to an avowry for rent, defendant may plead payment of ground rent to the original landlord, though he cannot plead a set off. *Sapsford v. Fletcher*, 4 D. & E. 511.

Set off must be for liquidated demands.

The debt or demand set off, must be liquidated and certain.

Not damages unliquidated.

Damages therefore not yet recovered, cannot be set off, *Freeman v. Hyett*, Blac. 394.; as in action of covenant against defendant, unliquidated damages arising from the breach of other covenants to be performed by plaintiff, cannot be pleaded by way of set off. *Howlet v. Strickland*, Cow. 56.

Nor penalties for breaches of agreement.

So to an action of *assumpsit*, defendant pleaded articles of agreement with a penalty, and shewed a breach whereby penalty became due, and offered to set off, on demurrer.

Of the Plea and Notice of Set off.

demurrer, the plea was held not within the statutes, for there may not be 5*l.* justly due to defendant on the balance, *Nedriffe v. Hogan*, Burr. 1024.

For debts to be set off should be such as an *indebitatus assumpsit* will lie for. Cow. 56. *Howlett v. Strickland*.

Where therefore the sum is not by way of penalty but as stipulated damages, then it may be set off.

As if two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed. *Fletcher v. Dyche*, 2 D. & E. 32.

unless it is by way of stipulated damages.

By the statute a simple contract debt may be set off against a specialty debt, or *vice versa*; and such was the opinion of the court of B. R. even before the passing of the 8 G. 2. Bull. Ni. Pri. 179.

Simple contract debts may be set off against specialties.

In debt on bond, the defendant craved oyer of the condition, which was to pay the plaintiff 10*l.* *per annum* during life; and then pleaded, that the plaintiff was indebted to him 500*l.* for money lent, &c. exceeding the yearly sums that had incurred for the annuity, and offered to set off as much, &c.; and on demurrer the plea was holden good. *Colins v. Colins*, Burr. 820. Bull. Ni. Pri. 180.

How to plead set off in actions on bonds.

But in such action on a bond, defendant must set forth in the plea what is really due on the bond before he is entitled to set off any cross demand under 8 G. 2. c. 24. and such averment is traversable. *Symmons v. Knox*, 3 D. & E. 65.

Real sum shown.

Of the Plea and Notice of Set off.

How far it extends to bail-bonds.

In debt on bond, defendant pleaded a greater debt in bar; upon which the plaintiff prayed to have the condition of his bond enrolled, which was to appear at Westminster, and demurred; and it was holden, that this bond was not within the 8 G. 2. for that statute relates only to bonds conditioned to pay money, and not to bail-bonds; and it was not within the statute 2 G. 2. because the plaintiff did not bring the action in his own right, but as trustee for another. (for he was an officer in the palace court); but if it had been given to the sheriff and by him assigned to the party, it might be otherwise, and then the penalty would have been considered as a debt, because it would have depended upon the 2 G. 2. Bull. Ni. Pri. 179.

Set off pleaded though action brought for the debt set off.

Defendant may plead a debt by way of set off to an action brought against him, though he has already commenced his action against the plaintiff for that very debt which he sets off, and plaintiff has in such action of defendant's paid the amount into court. *Evans v. Profser*, 3 D. & E. 186.

How such plea operates in cross actions.

A. brought an action against B. for 30*l.* to which there was no set off, B. brings his action against A. for 11*l.* due to him; A. pleads by way of set off the very debt for which he had before brought his action; both causes are set down for trial: A.'s cause comes on first, and there being no set off, he gets a verdict for the whole sum; then B.'s cause comes on. A. may still insist upon the validity of his set off, notwithstanding he has got a verdict for the very debt set off, for the verdict did not annihilate or extinguish the debt, nor change the nature of it or the rule of law: it only amounted to conclusive evidence, and he had the same right to set it off after verdict as before. The motion was rightly and truly given at the time when it was given, and the mere accident of his cause being tried first shall make no difference, and a *remittitur* may be entered on the first record for so much; B. ought to have set off his less demand in A.'s action. *Brown v. Basketville*, Burr. 1231.

A judg-

Of the Plea and Notice of Set off.

A judgment can be pleaded by way of set off though a writ of error be pending thereon. *Reynolds v. Beer- ing & Evans & Proffer*, 3 D. & E. 187. Judgment set off pending error.

Where a prisoner in execution is discharged by the consent of his creditor upon giving a fresh security to satisfy the judgment, and that security is afterwards defeated on account of a mere informality, the judgment is satisfied and cannot be set off against a demand of the prisoner. *Jaques v. Withy*, 1 D. & E. 557. Judgment satisfied by fresh security given.

A debt barred by the statute of limitations cannot be set off: if it be pleaded in bar to the action, the plaintiff may reply the statute; and if given in evidence at the trial on a notice of set off, it may be objected to. *Bull. Ni. Pri.* 180. Debt barred by Statute of limitations cannot be set off.

¶ Of the Parties between whom there may be a Set off. ¶

Mutual credit may be constituted though the parties do not mean particularly to trust each other, as if a bill of exchange accepted by A. get into the hands of B. and B. buy goods of A. there is mutual credit between A. and B. which may be set off by B. though A. did not know when he let B. have the goods, that such bill was in his hands. *Hanky v. Smith*, 3 D. & E. 507. n. Of the parties between whom there may be a set off.
How mutual credit may arise.

By the 5 G. 2. c. 30. s. 28. the commissioners are empowered, where there has been mutual credit or mutual debts between the bankrupt and other persons, to set off one debt against the other, and the balance only is to be claimed or paid. Of set off in case of bankruptcy.

But it was holden since the passing of that act, that in an action by assignees of a bankrupt, defendant could not set off a debt due from the bankrupt. *Ryal v. Lar- kin*, 1 Wil. 155.

But this case was afterwards impeached as contrary to law, justice, and sense; and it was held that the de-
B b 2 fendant

Of the Plea and Notice of Set off.

defendant might set off a debt due to him from the bankrupt, for the assignees are the bankrupt. *Ridout v. Brouch*, Cow. 134.

But if an action be brought by the assignees for a debt accruing to them as assignees since the bankruptcy, defendant cannot set off a debt due to him from the bankrupt before the bankruptcy. *Ib.*

If a bankrupt on the eve of his bankruptcy fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in trover, but if they bring *assumpsit*, they affirm the contract, and then the creditor may set off his debt. *Smith & others v. Hodson*, 4 D. & E. 211.

Where the defendant lent his acceptance to the bankrupts on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of a third person, yet the defendant having paid the amount after the commission issued and before the action brought by the assignees, is intitled to set off the same under the words *mutual credit* in the 5 Geo. 2. c. 30. s. 28. *Ib.*

Assumpsit will lie for a creditor's share under an order of commissioners for a dividend; and in such action the proceedings before the commissioners are conclusive evidence of the debt, and the assignees cannot set off a debt due from plaintiff to the bankrupt. *Brown v. Bullen*, Do. 407.

If a demand be payable at all events, though at a future day, it may be proved under a commission of bankrupt against the debtor, or *set off* in an action brought by the assignees; but if it rest in contingency, whether it will be paid or not, it cannot be so proved or *set off*, unless it be secured by a penalty which is forfeited at law. *Handcock & others assignees v. Entwistle*, 3 D. & E. 435.

See also *Grove v. Dubois*, 1 D. & E. 112. as to brokers with commissions *del credere*, proving losses under notices

Of the Plea and Notice of Set off.

notices of set off, or under statute 5 Geo. 2. c. 30. in actions by assignees of bankrupts for premiums of insurance.

If an executor or administrator brings an action for money due to the testator or intestate, defendant may set off debt due from such testator or intestate to himself. Of set off in cases of executors, &c.

So if a partner or executor brings an action in his own right for money received by defendant *after* the death of the other partner or testator, defendant may set off whatever was due to him from plaintiff. *Smith v. Barrow*, 2 T. R. 476. In cases of partners.

B. appointed A. his attorney to receive rents, who after B.'s death received money for rent arrear in B.'s life-time. B.'s executrix brought an action for this money in her own name, and A. gave notice to set off a debt due from B. to him; this was not allowed at the trial, because the testator had never any cause of action against A. for the money was not received by A. till after B.'s death. *Shipman v. Thomson*, East. 11 Geo. 2. C. B. Bull. Ni. Pri. 180.

A debt due to a man in right of his wife, cannot be set off in an action against him on his own bond. Bull. Ni. Pri. 179. Of demands in right of a man's wife.

Where defendant had paid the plaintiff all the money he had received for him, except what he retained for his labour and service, he may, in an action for money had and received, give that in evidence on the general issue, without any notice of set off; for it is not in the nature of a cross demand or mutual debt, but it is a charge which makes the sum of money received for plaintiff's use so much less. *Dale v. Sallett*, Burr. 2133. A retainer in certain cases need not be set off, but may be given in evidence.

*Of the Plea and Notice of Set off.***D. Of the Form of a Notice of Set off and its Incidents.**

The form of a notice of set off.

Plea general issue.

Of the form of the notice.

Mr. J. M.

Take notice, that the said defendant C. D. intends to give in evidence at the trial of this cause, and insist, that the said plaintiff A. B. was before and at the time of the commencement of this suit against the said defendant, and still is indebted to the said defendant in more money than is due to the said plaintiff by reason of the promises and undertakings in the declaration mentioned, to wit, at afore-said, in the said county, in the sum of 40l. for so much money before that time lent and advanced by the said C. D. to the said A. B. at his special instance and request; and in the further sum of 40l. for so much money before that time paid, laid out, and expended to and for the use of the said A. B. at his like special instance and request, (and the like according as nature of debt may be;) which said sums of money, or so much thereof as will be sufficient to answer and satisfy such demands as the said plaintiff A. B. shall be able to prove against the said defendant C. D. by reason of the promises and undertakings in the said declaration mentioned, at the trial of this cause the said C. D. will give in evidence, set off and deduct against such demands of the said plaintiff, according to the form of the statute in such case made and provided. Dated, &c. Your's, &c.

O. P. defendant's attorney.

To Mr. T. S. plaintiff's attorney.

The above notice must be written underneath the Plea on the same sheet of treble penny; a copy of which must be kept by the defendant's attorney, it being necessary to prove a delivery thereof on the trial of the cause.

When the debt set off must be due.

The debt that is set off must have been due at the commencement of the suit; it will not do to plead, that plaintiff was indebted to defendant in so much at the time of the plea pleaded. *Evans v. Proffer*, 3 T. R. 186.

Though in the case of *Reynolds v. Beering*, 25 G. 3. Do. 112. N. it was not long before held the contrary;

Of the Plea and Notice of Set off.

contrary; and on the same principles also was the case of *Sullivan v. Mountagu*, Do. 106.

Defendant pleaded the general issue, but forgot to give notice at the same time of a set off; and upon motion in time, the court gave leave to withdraw the plea, in order to deliver it again with a notice of set off, saying it had been done so before. *Blackbourn v. Matthias*, 2 Str. 1267.

General issue withdrawn and pleaded with notice.

A notice of set off was as follows:

"Take notice, that you are indebted to me for the use and occupation of an house for a long time held and enjoyed, and now lately elapsed." *Per* Ld. Hardwicke C. J. these notices should be almost as certain as declarations; the legislature designed them to be in the nature of cross actions, and they should be expressed with great certainty, that the plaintiff might be able to make a proper defence to them. Had this been a declaration for use and occupation, it had certainly been bad, for it must have shewn the commencement and determination of it; afterwards it appeared, that the debt designed to have been set off was for rent reserved on lease by indenture; which not being mentioned in the notice, the chief justice said it was bad on that account also; for if this had been shewn, the plaintiff might probably have proved an eviction or some other matter to have avoided the demand. *Fowler v. Jones*, sittings at Westminster, Hil. 8 G. 2. Bull. Ni. Pri. 179.

Of the certainty requisite in notice.

Motion to amend a notice of set off, but denied. Notices of this kind are in this like notices of trial, &c. which never were amended by the court. Bar. 294. *Anon.*

Notice of set off not amendable:

But defendant may withdraw same, and plead *de novo*, *non assumpsit*, and a new notice.

But may be withdrawn and pleaded *de novo*.

On plea or notice of set off, plaintiff may take out summons for the particulars of defendant's demand, which he means to set off, and if such particular be not delivered by the time limited by the order, defendant is precluded going into his set off.

Plaintiff may by summons know particulars of set off.

Of the Plea and Notice of Set off.

Sometimes necessary to pay money into court with set off.

Where the defendant's demand does not countervail plaintiff's, he should, besides setting off his debt, move the court wherein the action is depending for leave to pay so much money into court as with his own demand will be sufficient to satisfy the plaintiff's.

SECTION XI.

*Of Replying, Rejoining, &c.**In B. R.*

How to reply, rejoin, &c.

Get a rule from the master, take same to the clerk of the rules, who will enter it on the back of your last proceeding, viz. plea, replication, &c. pay 1s. 10d. for a copy thereof on common paper on plaintiff's attorney, naming the cause thus:

A. against B.

Monday next after, &c. to reply—entered.

If the replication, &c. is not filed or delivered, as the case may be, (if special, at the clerk of the papers, if to a general plea, to the attorney,) then when rule is expired, sign judgment of non pros.

No demand is necessary in this court, as the service of the rule is held a demand of itself.

Of the rule to reply, and when judgment may be signed.

There is no precise time fixed for replying, rejoining, &c.; but if the party who is to do the act is served with a copy of the rule for that purpose, he must reply, &c. within four days exclusive after the service of copy of such rule, and if he does not, judgment may be signed; but if judgment be signed, or other proceedings had within that time, the same, on application to the court, will be set aside; and Sunday, or any holiday on which the court

In C. B.

Give a rule for that purpose thus:

A. against B.

Rule to reply.

T. S. Attorney.

Take it to secondary's office, pay 1s. 10d. then make a demand thus:

In C. B.

A. v. B. The defendant demands a replication in this cause by your's.

T. S. attorney for defendant.

When the time is expired and replication not delivered, search for it at prothonotary's, and if not filed there, sign judgment of non pros.

Of Replying, Rejoining, &c.

court doth not sit, not being the last of those four days, is to be reckoned a day within those rules.

If a cause has continued four terms without prosecution before issue joined, each party shall have a whole term's notice to reply, rejoin, &c. (unless the cause has been stayed by injunction or privilege;) which rule must be given before the effoin day.

How if four terms have elapsed.

Rule to reply, rejoin, &c. may be given at any time in term, or within 16 days after term, except Easter term, and then in C. B. in 10 days.

When rule to be served.

If time be wanted to reply, &c. apply for a judge's summons, and draw up order as in other cases.

How, if time wanted.

If an interlocutory judgment is signed, and the plaintiff has neglected to give a rule to plead, the defendant must take advantage of that, or any other irregularity, two days at least before executing the writ of enquiry, or not at all. 1 Bar. 165, Pract. Reg. 242.

Whenever the plaintiff adds the *similiter* to the end of his replication, and delivers the issue with notice of trial to defendant's attorney, who receives the same, and does not strike it out and demur, there is no occasion for plaintiff to give a rule to rejoin, and if defendant does not pay the issue money, he may sign judgment. *Bogge v. Eyre*, C. B. T. R. 254.

No rule necessary when plaintiff adds *similiter* and it is not struck out.

In all cases when defendant's plea concludes to the country, plaintiff may add *similiter*, and deliver issue with notice of trial.

When plaintiff may add *similiter*.

If defendant do not rejoin, it is considered as an abandonment of the plea; plaintiff therefore may strike out all the previous pleadings, and enter judgment as for want of a plea, not for want of a rejoinder. *Petrie v. Fitzroy*, 5 D. & E. 152.

If no rejoinder, plaintiff may enter judgment as for want of a plea.

On a rule to plead, reply, rejoin, &c. in four days, if the party on whom the rule is made delay complying with it till the morning of the 5th, the adverse party may refuse to receive it and sign judgment. *Thomson v. Ryall*, 4 D. & E. 195.

Rejoinder, &c. may be refused after rule out.

C H A P. VIII.

Of Proceedings on Demurrer.

We have hitherto presumed, that the proceedings in the suit have gone regularly on, in order to bring some matter of fact before a jury to be tried; but it often happens, that either the cause of action itself, as stated in the declaration, is not maintainable in point of law, or that the defence or justification set up by defendant in his plea is not a legal defence, or matter which can, agreeable to the rules of law, be pleaded; or even if the cause of action, or the matter set forth in their plea be in substance good, yet it may be informally set forth or pleaded; in which cases the plaintiff or defendant may object to the validity of the declaration or pleading by way of demurrer, and may bring the point, which is a mere question of law, to be argued before the judges in term time for their decision. It is proper therefore to treat,

(A) Of general and special Demurrers.

(B) How to proceed on Demurrer in B. R. and C. B.

(C) How when there are Issues to part, and Demurrer to part.

(D) Of waiving and withdrawing Demurrers, and amending after Argument.

(E) Further general Observations on Demurrers.

Demurrer what.

A demurrer in pleading is an admission by the adverse party of the fact charged in the count or declaration, plea, replication, &c. but refers the law arising on such fact to the judgment of the court.

Special or general.

A demurrer is either special or general.

How, at common law.

There were special demurrers at common law, as well as general; but special demurrers were never necessary, except in cases of duplicity, and therefore seldom practised; for as the law was then taken to be on a special demurrer, the party could take advantage of no other defect,

defect, but that which was specially assigned for cause of demurrer. But upon a general demurrer he might take advantage of all defects, that of duplicity only excepted; and there was no inconvenience in such practice; for the pleadings being at Bar, *viva voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general, as upon a special demurrer. After the Reformation, when the practice of pleading at Bar was altered, the use of general demurrers notwithstanding continued, and thereby this public inconvenience followed, that the party whose pleading was demurred to came into court, not knowing what he was to argue. This inconvenience occasioned the statute 27. of Eliz. which enacted, "That after demurrer joined, the judges shall proceed and give judgment, according as the right shall appear, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or cause of proceeding, except those only which the party demurring shall specially and particularly set down and express with his demurrer. And that upon such demurrer joined and entered, the court shall amend all such imperfections, defects, and wants of form, other than those which the party demurring shall particularly assign."

How altered by
stat. 27 Eliz.

Special demur-
rer revived.

This statute in great measure was restorative of the common law, and required in all cases of form a special demurrer; but a general demurrer still sufficed for all matters of substance. However, many things which were construed to be matters of substance, since the making of the above statute of Elizabeth, are by subsequent statutes regarded but as matters of form only, and shall be aided, if not specially demurred to. *Vide* what omissions and defects are still aided after verdict by the 16 & 17 Car. 2. C. 8. and other statutes of jeofails.

Other statutes
affecting special
demurrers.

The statute 4 & 5 Anne, C. 16. in furtherance of the statute of Elizabeth, enacts, That no exception shall be taken of the following matters on a general demurrer, which before were regarded as matters of

Stat. 4 & 5
Anne, c. 16.

of substance, and were fatal on a general demurrer, viz.
 “ An immaterial traverse, default of entering pledges
 “ upon any bill or declaration, default of alledging of
 “ bringing into court any bond, bill, indenture, or other
 “ deed, mentioned in the declaration or pleading; de-
 “ fault of alledging of the bringing into court letters
 “ testamentary, or letters of administration; the omis-
 “ sion of *vi et armis, et contra pacem*, or either of them;
 “ or the want of averment of *hoc paratus est verificare*,
 “ or *hoc paratus est verificare per recordum*, or for not
 “ alledging *prout patet per recordum*, or matters of the
 “ like nature.” So that for these defects the party
 must now demur specially.

A departure re-
quires a special
demurrer.

A departure, though not mentioned, has been held to be within this act; and therefore, for a departure in pleading there must now be a special demurrer, though before this statute a departure was fatal on a general demurrer.

The 4 & 5 Anne does not give any remedy upon general demurrer, but in matters of the same nature with those which are there specified. *Hodgethorn v. Thurlock*, Com. 306.

Statutes do not
extend to pleas
in abatement.

The statutes 27 of Eliz. and 4 & 5 Anne, directing the judges on demurrer joined to give judgment according as the right shall appear, extend only to such demurrers as go to the action, and not to demurrers to pleas in abatement. *Moore*, Com. 309.

Therefore a special demurrer is never necessary to a plea in abatement, but a general one will do. *Watts & Goodman*, 1 Barn. 11.

Rule as to ge-
neral or special
demurrer.

The general rule is, that in all cases where pleadings are demurred to for matter of form, and for the causes specified in the acts above mentioned, a special demurrer is requisite; but whenever the demurrer is for matter of substance, a general demurrer is sufficient.

Duplicity is still aided on a general demurrer; for to say because plea is double, and wants form, is not sufficient,

sufficient, it ought to shew in what the duplicity consists.
Lamplugh & Shortridge, Com. 115.

Notwithstanding a general demurrer still suffices for want of substance, yet in doubtful cases it is best to shew the cause of demurrer; because on a special demurrer, any matter of substance, though not expressly alledged, may be taken advantage of; whereas no advantage can be taken of any matter of form on a general demurrer.

A plea may be bad on a general demurrer, though it might be helped after verdict, as *nil debet* to an action on bond. *Anon, 2 Wil. 10.* Plea bad on demurrer, though aided by verdict.

A demurrer, whether general or special, ought to be signed by a counsel in B. R. and serjeant in C. B. Demurrers must be signed.

B. How to proceed on Demurrer.

B.

In B. R.

In the King's Bench, if there is a general demurrer to the declaration, the plaintiff's attorney adds a joinder thereto, and makes up and delivers the issue thereupon, for which the other side must pay 4d. per sheet, besides stamps; if not paid for on demand, judgment may be signed: but if the demurrer is special, or if general, after a special plea pleaded, the same must be filed with the clerk of the papers, who makes up the demurrer book with the joinder, and gives a rule in the margin for the defendant to receive and return the same to plaintiff's attorney, (this must be done in 24 hours and entries be paid for;) if he returns demurrer book and pays for the entries, an incipitur is entered on the King's Bench roll, plaintiff's attorney then gets a number roll and carries

In C. B.

In the Common Pleas, when a demurrer is joined, the plaintiff's attorney, in all cases, makes up the demurrer book, and delivers it on treble penny stamp paper to the defendant's attorney, who pays for it at the rate of 4d. per sheet, besides stamps; and also for entering his pleadings and warrant of attorney; then plaintiff's attorney enters the whole proceedings on the roll, which is got of prothonotary, and having delivered the same to the secondary, he gets a serjeant to move for a concilium, or day to argue it; and the secondary draws up a rule accordingly, which must be served on defendant's attorney, and the demurrer put down for argument, and must be of same term issue is joined on demurrer, file warrants of attorney and docket roll at prothonotary,

ries the same with the demurrer book to the clerk of the judgments, enters and docquets the issue, if there is one; finishes the entry on the roll, and then the same is carried to and filed at the nisi prius office in Gray's Inn.

When this is done, a motion is to be signed by counsel for a concilium or day to argue the demurrer, pay 10s. 6d. take your roll to the clerk of the papers, who will mark it "read," pay 1s. 6d. and he will sign his initials on counsel's brief, then you draw up a rule with the clerk of the rules, pay 4s. 6d. and apply to the clerk of the papers to set down the cause, pay 1s.

If the demurrer is to be argued, serve rule for concilium on the attorney of the other side, (and indeed it is fair to do this in all cases whether demurrer be argued or not,) make four copies of the demurrer books on unstamped paper, plaintiff is to deliver two, viz. one to the chief justice, and the other to the senior judge, two days before the day of argument, and defendant ought to deliver two to the other two puisne judges on his part; but should be not have done so before eight in the evening of the day two days before the argument, then deliver the other two to the other two judges, (R. M. 17 Car. 1.) pay the clerks each 2s. When defendant has neglected to deliver his two books as above-mentioned, he cannot be heard on argument; so that plaintiff

need

tary, pay 8d. per sheet for entries, then make a brief for serjeant to move for concilium, take it to secondary, who will mark the roll "read in court," pay crier 1s. get rule of secondary in the evening, and serve copy on defendant's attorney, and at the time when the rule is drawn up by secondary, set down with him cause for argument, then deliver copies of demurrer book to the judges, all four of which are in this court delivered by plaintiff's attorney, defendant paying for two two days at least before argument; if not paid, defendant shall not be heard by his counsel when demurrer comes on. Mich. 6 G. 2.

If judgment be for plaintiff, proceed as in B. R. *mutatis mutandis*, according as judgment be interlocutory or final. Demurrer must be signed by serjeant.

In order to compel plaintiff to go on to argument, get a rule of secondary to enter the issue, which is a four day rule, serve copy on plaintiff's attorney; if he enter the issue, and does not proceed to move for a concilium, defendant may move and proceed to argument the same as plaintiff; if plaintiff does not enter issue agreeable to rule, sign judgment of non pros.

need only make a brief of demurrer for counsel, with one guinea fee, to move for judgment, which is done of course when called on, upon the day of argument; at which day attend and pay criers 4s.

Go in the evening to clerk of the rules, get rule for judgment, and if the judgment be final, as if it be an action of debt, stamp the rule with double half crown, and proceed to tax the costs; having first, if the roll be already carried into the treasury, bespoke the rule to be at the master's; but if not carried in, then enter proceedings thereon yourself, pay 3s. 6d. to master for marking it, and take out execution.

If demurrer be argued, and action in debt, no rule for judgment need be given; but if the judgment be only interlocutory, as if it be an action on the case or the like, then, having drawn up rule for judgment, get a treble penny stamped paper, enter memorandum thereon, get judgment signed thereon by clerk of judgments, and give notice of executing a writ of inquiry, and proceed as in other cases of judgment by default.

If plaintiff refuses or neglects to enter demurrer, defendant may get a rule of secondary to compel him; and on default, he himself may enter such demurrer on record.

In which case make up paper book, get a rule of master, which he gives on the book or
on

on a detached piece of paper
thus :

Unless the plaintiff enters the
issue on record, on ^{next}
after, let the same be entered on
the part of defendant ; enter it
at clerk of rules, and serve copy
when the book is delivered.

How to compel
party to join in
demurrer.

If the party refuses to join in demurrer, you get a rule for that purpose, as when a party neglects or refuses to reply, rejoin, &c. and then the party must do it within four days, otherwise judgment may be signed.

A demurrer is to be entered on the roll of the term in which it is joined. *Cortizos v. Munoz*, Bar. 328.

Notice of exe-
cuting enquiry
may be given on
back of demur-
rer.

Where the defendant demurs to the declaration, his attorney shall be obliged to accept of notice of executing the writ of enquiry, (if it is an action sounding in damages,) on the back of the joinder in demurrer ; and if defendant pleads such a dilatory plea as the plaintiff is obliged to demur to, defendant's attorney shall be obliged to accept of notice of executing a writ of enquiry on the back of such demurrer. Tr. 10 Geo. 1. C. B. The same rule in B. R.

How paper book
to be delivered,
&c.

After joinder in demurrer, plaintiff, 27th October, moved for a *concilium*, and afterwards delivered the paper book the same day, which was held to be irregular, and the cause ordered to be struck out of the paper. The regular practice is to tender the paper book to defendant's attorney, if he refuses to accept and pay for it, judgment may be signed for want thereof ; if he accepts and pays for it, then plaintiff is to move for a *consilium*, and proceed to argument. *Sharpe v. Sharpe*, Bar. 163.

Of moving for
consilium, &c.

In *assumpsit*, the defendant pleaded the general issue, and also the statute of limitations ; the issue was found against

against him at the assizes; but as to the special plea there was a replication, rejoinder, and surrejoinder; to which the defendant demurred, and the plaintiff joined in demurrer. This term the plaintiff made it a *concilium*, put it in the paper, and nobody to support the demurrer, obtained judgment; it was now moved to set this aside as irregular, the rule for the *concilium* having never been served, or any notice given of putting it in the paper. But the court held it not to be irregular, and that it was the duty of the defendant to search, since he must expect the plaintiff would proceed. Then it was moved to set it aside upon payment of costs, upon the foot of setting aside regular judgments. But the court said that was never to be done, but where the defendant was to plead to the merits, not to give him the advantage of a nicety in pleading; and if there was any ground for the demurrer, (as in fact there was,) he might bring a writ of error. *Forbes v. Lord Middleton*, Str. 1242.

Defendant must search for *concilium*; plaintiff not obliged to serve rule when defendant demurs.

If plaintiff take no step in the cause for three terms, and in the fourth sign a *concilium*, and obtain judgment in the fifth, the signing of the *concilium* is taking a step in the cause, so as to make it unnecessary to give a term's notice. *Bland v. Darley*, 3 D. & E. 530.

Signing a *concilium* deemed a step in the cause.

C. How to proceed when Issue to part, and Demurrer to part.

C.

Where there is an issue to part, and demurrer to part, you may either try the cause, or argue the demurrer first, at election. If the latter, all the proceedings are entered on the roll as in the paper-book, and you proceed as if there was no issue at all.

How if issue to part, and demurrer to part.

Formerly where there was a demurrer to part, and an issue upon the other part, and judgment was given for the plaintiff on the demurrer, he must have entered a *non pros* as to the issue, and proceeded to a writ of enquiry on the demurrer; but without a *non pros* he could not have a writ of enquiry; because on the trial

C c

of

of the issue, the same jury would ascertain the damages for that part of which the demurrer was. Sal. 219. Pl. 6.

Where there are issues in fact and in law, the plaintiff may waive the issues in fact, and take out an enquiry upon the demurrer.

There were four counts in the declaration, *non assumpsit* pleaded to three, and a demurrer to the fourth. After judgment on the demurrer, the plaintiff takes out a writ of enquiry, and executes it. This was moved to be set aside, there being no *nolle prosequi* on the roll; and it was insisted, that the plaintiff ought to take out a *venire, tam* to try the issue, *quam* to enquire of the damages upon the demurrer; *sed per curiam*, that is indeed the course, where the issues are carried down to trial before the demurrer is determined, and in that case the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count, there is no reason why we should force him to carry down the cause to *nisi prius*; and as to the want of a *nolle prosequi* upon the roll, he may supply that when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the enquiry must stand. *Fleming v. Langton*, Str. 532.

Where a *nolle prosequi* is entered, the plaintiff need not be amerced.

In error, è C. B. in an action upon the case on several promises, there is judgment on demurrer as to one count, whereupon the plaintiff enters a *nolle prosequi* as to the rest, and the defendant is put without day.

It was objected, that this is a confession that the plaintiff had no cause of action as to those counts, and therefore he should be amerced *pro falso clamore*. But Eyre J. (*solus*) thought it agreeable to all the entries, and so the judgment was affirmed. *Davies v. Hoyle*, Str. 574.

Judgment when obtained, must be signed before enquiry executed.

Plaintiff obtained judgment upon arguing a demurrer in an action upon the case, and proceeded to execute a writ of enquiry, without getting judgment signed by the prothonotary, which the court held to be irregular, and set aside the writ of enquiry. *MacCarty v. Parminter*, Bar. 229.

Of

D. Of waiving and withdrawing Demurrers, and amending after Argument.

D.

Defendant cannot waive a general demurrer, and give a special demurrer or special plea; but he may strike out of paper-book special plea or demurrer, and return it with general issue or general demurrer. N. on R. T. 5 & 6 Geo. 2.

General demurrer not to be waived for special, but it may vice versa.

So a general demurrer cannot be waived and general issue pleaded, but a special one may; and general issue with notice of set-off be afterwards pleaded.

In an action against bail, court refused to give leave to withdraw a demurrer, and amend after demurrer had been argued, and the opinion of the court was known. *Saxby v. Kirkus*, Say, 117.

When it may be withdrawn, and pleadings amended.

Yet after argument on special demurrer, leave has been given to amend on payment of costs. *Luxton v. Robinson*, Do. 620.

After a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to shew cause why plaintiff should not have leave to withdraw his demurrer, and to reply to the plea. No cause being shewn, rule made absolute. *Giddings v. Giddings*, Say, 316.

After the demurrer was argued, and the justices had given their opinion, judgment was suspended for a week, in order to give the defendant time to move for leave to withdraw the demurrer, and amend. *Rennale v. Rennale*, Say, 317.

Debt against defendant, as heir on the bond of his ancestor. Plea *reins per descent*. Replication assents. Demurrer *inde*, and joinder; and the cause was set down. Then defendant moved for leave to withdraw the demurrer, and rejoin issuably on payment of costs. On shewing

shewing cause, plaintiff insisted, that by the demurrer he had been delayed an assizes, and defendant now came too late to withdraw his demurrer, unless he would give judgment for plaintiff's security. The serjeant for defendant urged a diffidence of his own opinion as to the validity of the pleadings, and was fearful to venture the argument; because, if judgment had passed against his client on demurrer, the debt must be paid out of defendant's own goods, if on verdict out of assets. Rule absolute by three judges. Denton *contra*. *Hunt v. Puckmore*, Bar. 155.

Declaration in an action on the case was of two counts against two defendants, in second count only one of defendants was named. Defendant demurred. Plaintiff entered a *nol. pros.* as to the last count; but court were of opinion that he could not enter *nol. pros.* in that stage of proceedings, but they gave him leave to amend on payment of costs. *Drummond v. Dorant*, 4 D. & E. 360.

Where demurrer argued before trial of issue, amendment allowed, not *contra*.

Where the demurrer is first argued before any trial of the issues, the court will give leave to amend, as in the case of *Giddins*, Say, 316. But there never was an instance of amending an issue at law after a verdict has been found on the issues upon facts, and contingent damages found upon the demurrer. *Robinson v. Raley*, Burr. 322.

C.

C. General Observations on Demurrer.

Demurrer an issuable plea.

A demurrer on the merits is an issuable plea within judges order. *Wright v. Russell*, 2 Blac. R. 923. *Dewey v. Sopp*, Str. 1185.

Not to be amended.

If a demurrer is badly drawn, as if in a demurrer to a plea in abatement, it concludes with praying judgment of the action, instead of *respondeas ouster*, it is a discontinuance, and cannot be amended without consent of the other party. *Maynard v. Hopkins*, Say, 46.

In

The entry of the judgment was, *ideo consideratum est*, Proper form of
 &c. and not said as usual, & *quia videtur curia*, &c. entry of judg-
 and for that cause it was reversed; for when a demur- ment.
 rer is joined, the matter of law is submitted to the
 court, and they must say whether it is *sufficiens*, or *minus*
sufficiens, before they pronounce judgment, otherwise it
 don't appear that they determined the matter of law be-
 fore them. *Atwood v. Burr*, Sal. 402. Ld. Raym. 821.
 S. C.

Tuesdays and Fridays in every term are called special Paper days.
 paper days, because the court goes into the paper before
 they enter upon motions.

All causes standing for argument in the special paper, Causes to be ar-
 to come on in the same order in which they are there gued in their
 entered, and so to continue to stand till they shall be turn.
 argued, and none to be put off without a previous spe-
 cial application to the court. *Burr. R. 52.*

CHAPTER IX.

Of the Proceedings from Issue to Trial.

SEC. 1. *Of the Issue and Paper Book, and of entering the Issue.*

SEC. 2. *Of Notice of Trial and countermanding same, and of Costs for not proceeding to Trial.*

SEC. 3. *Of carrying down Record by Proviso.*

SEC. 4. *Of putting off the trial.*

SEC. 5. *Of making up the Record, suing out Jury Process, entering Cause for Trial, and of Remanents.*

SEC. 6. *Of Special Juries.*

SEC. 7. *Of granting a View.*

SEC. 8. *Of examining Witnesses on Interrogatories.*

SEC. 9. *Of the Process to compel Witnesses to appear at the Trial.*

SECTION I.

Of the Issue and Paper Book.

Issue, what.

WHEN the plaintiff and defendant by their respective pleadings have agreed upon the point or points to be tried by the jury as the subject matter of dispute between them, they are then said to be at issue; an issue being an affirmation of any fact or facts by the one party, and a denial thereof by the other.

How made up.

The plaintiff next proceeds to make up and deliver the issue, which is nothing more than a copy of all the pleadings which had before passed on each side between the parties. This, when made out by the attorney, (whose province it always is in the Common Pleas and in the K. B. when proceedings are by original, and when by bill, if there are no special pleadings,) is called

Of the Issue and Paper Book, &c.

called the *issue*; but when proceedings are by bill in the King's Bench, and there are special pleadings, they are then engrossed and copied by the clerk of the papers, and it is called the *paper book*. Difference between issue and paper book.

The cases in which the attornies themselves make up the issue in the court of King's Bench, if the proceedings are by bill, are, whenever the general issue is pleaded to the declaration, or some plea tantamount thereto, as not guilty to a new assignment of trespass—*liberum tenementum—comperuit ad diem—nul tiel record*,—in covenant, where Defendant pleads to the country. In every special *non est factum de injuria sua propria, to sons assault demesne*, when there is a general demurrer to a declaration. In all repladers, and in all issues and demurrers upon writs of error, *scire facias, & audita querela*. When issue made up by attornies in B. R.

All of which pleas were formerly entered in a *book*, kept for that purpose at the King's Bench office; and therefore it is said, in most of the books of practice, that in B. R. the attornies themselves may always make up the issues, where the issue is to be given on the book side of the office. Book side of the office, why so called.

In all other cases, clerk of papers makes up issue, then called, as abovementioned, the paper book.

The form of the issue in B. R. and C. B. somewhat varies, which is owing to the nature of the original jurisdiction of these two courts. The latter was established, and from its foundation intended as the court in which civil suits were to be prosecuted, but the original jurisdiction of the former was merely for criminal offences; and although by degrees it got cognizance of civil actions, yet they were deemed merely the bye-business of the court. They were entered, therefore, with a memorandum; and it is for this reason that memorandums are now used in the making up of the issues in B. R. but are never, except in particular cases, used in C. B. I say, except in particular cases, because in all matters which are deemed the bye-business of that court, memorandums are upon the same principle. Form of issue in B. R. and C. B. Why different as to the memorandums.

Of the Issue and Paper Book,

ciple made use of; such as proceedings by bill against their own officers, attornies, and the like.

In a word, in both courts, whenever the proceedings are by *bill*, memorandums are inserted, when by original they are omitted.

The chief distinction is, when proceedings by bill, and when by original.

Without making any distinction, therefore, between the two courts, we need only shew in what manner to make up the issue, when the proceedings are by bill, and when by original.

When the proceedings are by bill,

How to make up issue when proceedings are by bill.

Entitle the issue of the term in which issue is joined, let the declaration and plea be of what term they may; as,

Michaelmas term, in the 34th year of King George the 3d, (supposing the parties came to issue that term.)

In what cases the memorandum varies.

Then make a memorandum of the term in which plaintiff first declared, which memorandum, as issue is often joined long after the declaration, varies in four cases.

1st, When the issue is joined in the same term with the declaration.

2d, When the cause of action arises within the term in which Plaintiff declares; and then the declaration must be of a particular day in that term, and the memorandum also.

3d, When the declaration is of a precedent term to the issue, being joined, but not above four terms.

4th, When the declaration is above four terms before the issue is made up.

1st, How when issue joined of the same term.

When issue is joined of the same term in which declaration was, it is made up as follows:

Michaelmas term in the 34th year of King Geo. 3d, (being the term issue was joined.) * *Mansfield & Way.*

* In B. R. being the chief clerk's name; but if in C. B. put Mainwaring, or the prothonotary's name.

Mid-

And of entering the Issue.

Middlesex, to wit, Be it remembered, that on Saturday next after the morrow of all Souls, (the first particular return of the term,) in this same term, before our lord the king at Westminster, comes A. B. by Thomas Smith his attorney, and brings into the court of our said lord the king, before the king himself now here, his bill against C. D. being in the custody of the marshal of the marshalsea of our said lord the king, before the king himself, of a plea of trespass on the case, (or whatever the action is;) and there are pledges for the prosecution thereof, to wit, John Doe and Richard Roe; which said bill follows in these words, to wit; Middlesex, to wit, A. B. complains against C. D. being, &c. (reciting the whole declaration, omitting the pledges at the end thereof;) and then in a new line begin the plea, it being of the same term with the declaration.

Memorandum.

Declaration.

And the said C. D. by John Martin his attorney, comes and defends the wrong and injury when, &c. (reciting verbatim the whole pleadings till issue joined, and then award the venire thus:) Therefore (if there be more than one issue on defendant's plea; say, therefore, as well to try this issue as the said other issue or issues above joined, let) let a jury come before our lord the king at Westminster, on — next after fifteen days of Saint Martin, (the last day of term, if the cause is tried the sittings after; if in term, the first day of term; if in the country, the last day of the term,) and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the said parties there.

Plea.

Award of venire.

These &c.'s are contractions of the writ of venire, the form of which, vide post under the title "Of making up the record for trial."

If the plaintiff brings his action and declares in term time, and issue is joined in the same term, the memorandum must be of a particular day in term, so must the declaration also be entitled; and then the issue is made up thus:

ad, How issue made up, if cause of action arose within the term in which issue is joined.

On Friday after the morrow of St. Martin in the 34th year, &c.

Essex, to wit, Be it remembered, that on Saturday next after the morrow of St. Martin, (some day certain in term after the commencement of the action,) in the same term, before our lord the king at Westminster, comes, &c. (exactly as before.)

Memorandum

If

Of the Issue and Paper Book,

3d, How, if declaration be of precedent term to that in which issue is joined.

If the declaration is of a precedent term to the issue joined, then it is made up thus :

Hilary term, (the term issue is joined,) in the 34th year of the reign of King George the 3d.

Memorandum.

Suffex, to wit, Be it remembered, that in Michaelmas term last past, (the term declaration is of,) before our lord the king at Westminster, came A. B. by Thomas Smith his attorney, and brought into the court of our said lord the king, before the king himself then there, his bill against C. D. &c. (as before.)

And after the declaration, begin a new line with an imparlance, thus :

Imparlance.

And now at this day, to wit, on Monday next after the octave of Saint Hilary, (the first day of the term issue is joined, make the imparlance to the term in which issue was joined, let it be when it may, provided it be a different one from that wherein plaintiff declared, otherwise there is no need of any imparlance,) in this same term, to which day the said C. had leave to imparle to the said bill, and then to answer the same before our lord the king at Westminster, comes as well the said A. by his attorney aforesaid, as the said C. by Thomas Smith his attorney; and the said C. defends the wrong and injury, when, &c. (inserting all the pleadings, and awarding the venire as before.)

4th, How issue made up, if declaration be above four terms before issue joined.

And if the declaration is of above four terms before the issue is joined, then the issue is made up thus :

Memorandum.

London, to wit, Be it remembered, that heretofore, that is to say, in Trinity term, in the 34th year of the reign of our sovereign lord the now king, before the king himself at Westminster, came A. B. &c. (as above, making the imparlance to the term the issue is joined.)

How to make up issue when proceeding by original in B. R. or C. B.

The above is the mode of making up the issue in both courts when the proceedings are by *bill*, but when the proceedings are by *original*, which they are in all common cases in C. B. and are often by special original in B. R. the issue is made up exactly in the same form in both courts, without any memorandum, in the following manner :

Mansfield

And of entering the Issue.

Mansfield & Way, (the chief clerk's name, if in B. R.; if in C. B. the prothonotary.)

Hilary term, (the term in which the issue is joined, though the plea be delivered many terms back, make up issue of the same term in which it is joined,) *in the 34th year of the reign of King George the third.*

Middlesex, } *C. D. late of Westminster, in the county of Mid-*
to wit. } *dlesex, gentleman, (according as he is named,)*
was attached, (or summoned, as the case is,) and so on with
the declaration to the end thereof.

And then begin a new line, and enter the pleadings (if there are special pleadings they should be entered in order, as named in the margin of the issue, plea, replication, rejoinder, &c.) and the award of the *venire*, (which is always the general return day before the trial, if for the sittings after term; if in term, then the first general return of the term,) observing the entry, if the issue is to be tried in a county palatine, or in case of a Welsh issue, to be tried in the adjacent English county.

Such are the forms of the issue in *ordinary* cases, whether the proceedings be by bill or original, from whence it appears, that all which is necessary to be stated is, 1st, The title of the term when issue was joined. 2d, A memorandum (if by bill, but if by original, it is omitted) of the term declaration was of. 3d, The declaration itself. 4th, An imparlance, provided the plea was not of the same term with the declaration, in order to avoid a discontinuance of proceedings, which imparlance is to be until the term issue is joined. 5th, The plea and replication until the issue. And 6th, The award of the *venire*.

Summary of
what necessary
to be stated.

But in *particular* cases the issue must be made up according to the fact; as when there are two or more issues, or where one defendant lets judgment go by default, and the other pleads, or where the issue is into a county palatine, or it is a Welsh issue, or where the sheriffs are interested, and the *venire* is awarded to coroners, and the like; in all which cases there are special suggestions on the issue, and particular awards of the *venire*; but as the insertion of the various forms

How to make
up issue in par-
ticular cases.

would

Of the Issue and Paper Book,

Appendix N.

would be too great an interruption in this place, a few of the most useful may be found Appendix, note N.

And it was settled in Sir Peter Delme's case, and has always been the course of the court, that when either party will suggest any special matter about awarding the venire out of the common course, a copy must be given to the opposite party, and they must have a reasonable time to consider it, before you enter a *neint dedire*. *Brocas v. Civet of London*, Str. 235.

How issue to be engrossed, indorsed, and charged for.

Where the issue is made up as above directed, it must be engrossed on treble 1d. stamp paper; indorse thereon the charges which are in

B. R.

4d. per folio, (72 words,) besides stamps, and entering plea 1s.

C. B.

4d. per folio, (72 words,) and duty entering plea, if the general issue, 2s.; if special, 8d. per folio.

If appearance entered according to statute, charge it on back, which must be paid for.

In both courts, if declaration be delivered and not yet paid for, charge for same and for warrant, thus:

For declaration unpaid, so much.

Upon the back of the issue you may give notice of trial.

How issue to be delivered.

This issue is to be delivered to defendant's attorney, who is to pay for same according to the above charges, within 24 hours after delivery, or plaintiff may sign judgment by reason of such default.

Of the paper book, how made out, &c.

If there are *special pleadings*, the clerk of the papers must make out the issue (then called the *paper book*). Plaintiff's attorney may make out a copy of the declaration on unstamped paper, and give to the clerk of the papers (as he has only the pleadings in his office from the declaration); he will then make out the paper book, which is nothing more than the pleadings at length, transcribed upon a treble 1d. stamp paper, with the names of the respective counsel who signed the different pleadings, &c.; but, instead of being a close copy thereof,

How charged for,

And of entering the Issue.

thereof, as the issue is, there are only 72 words in a sheet. In the margin of the paper book is a rule for Defendant to receive and return it on a certain day therein mentioned, which is always within four days, exclusive of the day it is delivered (charge 8*d.* *per folio* for the whole, and 4*d.* for the pleadings *from* the indorsed declaration, as also the stamps); deliver paper book to defendant's attorney, with notice of trial indorsed, but keep a copy thereof. If not returned according to rule, and paid for, *i. e.* 8*d.* *per folio* for pleadings on defendant's part, such as plea, rejoinder, &c. and 4*d.* for plaintiff's entering, as replication, &c. (which is called issue money,) sign judgment; but if duly returned and paid for, proceed to trial.

Defendant pleaded and delivered plea to plaintiff's attorney, who made up the issue and delivered it to the defendant's attorney, who paid for it; but finding afterwards it should have been made up with the clerk of the papers, (it being in B. R. and the pleadings special,) went and paid him his fees, then made up the record and went to trial, and the court refused to set it aside, the defendant being in the first fault, in not leaving the plea at the office. *Thomson v. Tiller*, Str. 1266.

Where there are special pleadings in a cause, and the defendant would delay the plaintiff and prevent the expence of a trial, when issue and the paper book is delivered to him, he may scratch out the *similiter* joined, and leave a demurrer to the plaintiff's replication in the office, and, when the time is out, return the book, with notice thereof, in this manner:

Mr. J. M.

I have struck out the rejoinder, and left a demurrer to the plaintiff's replication in the office.

Or in C. B. he may strike out *similiter*, and return issue, with notice indorsed that he will file a demurrer in the office; in which case, plaintiff will be obliged to give a rule to rejoin. Imp. C. B. 318.

But, to prevent this trick, the plaintiff, if he is apprehensive that the defendant's plea is dilatory or frivolous, should move the court, that the defendant abide by

delivered,

indorsed,

returned,

and paid for.

How if made up by attorney by mistake, instead of clerk of papers.

Of striking out *similiter*, and demurring.

How this delay to be prevented.

Of the Issue and Paper Book,

by his plea, or plead another *instanter*. However, should it be practised, the paper book must be carried to clerk of papers to have demurrer and joinder added; it is then delivered again to the attorney, who must return it in 24 hours, and pay for the entries as above mentioned (it is now called the demurrer book); if not returned, judgment may now be signed; if returned and paid for, enter an *incipitur* on the roll, move for a *concilium*, and proceed in all respects as in common cases of demurrer, for which see *ante*, chap. 8.

How special plea or special demurrer may be struck out, and a general one pleaded.

But if a special plea or special demurrer be given in, and the book is made up and delivered to the defendant's attorney, he may strike out the special plea or special demurrer, and return it with the general issue or general demurrer upon leave, *vide* the case of *Weld v. Nedham* in B. R. 1 Wil. 29. ; but in C. B. if the plaintiff has replied, the defendant must apply to the court and pay cost. 2 Bar. 270.

Rule as to same, notice of trial for special issue serving for the general issue ;

Upon delivery of any paper book wherein an issue is joined, and notice of trial given on the back of the book, if the same be afterwards waived and the general issue given, the notice which was given for the trial of the special issue shall serve for notice of the general issue. N. on R. Hil. 8 Geo. 1.

or for enquiry on demurrer.

So if *similiter* struck out and demurrer given, notice shall serve for writ of enquiry, only plaintiff must give notice of hour and place of executing writ. N. on R. Tr. 8 Geo. 1.

Sham plea not considered as a special plea.

But a sham plea is not considered as a special plea, therefore where defendant pleaded to an action on bond in the *detinet* only, a sham plea that he did not detain the debt, and concluded with an averment, to which plaintiff demurred, and defendant struck out the demurrer, and gave the general issue *non est factum*, and it was moved for plaintiff to sign his judgment, the first being a sham plea; *per tot. Cur.* this is irregular and plaintiff shall have his judgment, for the first was a sham plea, and no special pleading; and although defendant may strike out special pleadings and give the general issue, yet that cannot be done without leave. *Weld v. Nedham*, B. R. 1 Wil. 29.

If

And of entering the Issue.

If defendant waives his plea and strikes out pleadings, and delivers the general issue, he pays nothing for the entries on return of book. Imp. B. R. 230. Ruled 30 Geo. 3d. What to be paid for entries on striking out plea, &c.

OBSERVATIONS.

A. On the Time and Manner of making up Issue or Paper Book.

B. Of delivering, paying for, and returning same.

C. Of immaterial and informal Issues.

D. Of withdrawing and amending Issue.

E. Of Continuances on Issue Roll.

F. Of entering the Issue.

The issue in C. B. or paper book in B. R. may be made out whenever the plaintiff takes issue upon the defendant's pleading, (*i. e.*) whether it be on his plea or rejoinder, or the like, or when the plaintiff traverseth the same, or demurs. In short, when the pleadings are come to that point that defendant is excluded from alleging any new matter: for otherwise a rule must be first given for defendant to rejoin and the like, before the issue or paper book can be made out. N. R. Trin. 1 Geo. 2. 3. Of the time of making up the issue or paper book.

If defendant's plea concludes to the country, plaintiff may immediately add *similiter* and deliver issue; and if plaintiff's replication concludes to the country, he need not deliver it for defendant to join issue, but may himself add the *similiter* and make up issue without any rule to rejoin. In other cases a complete issue must be joined in the regular way before issue is made up. *Boone v. Eyre*, 1 C. B. T. R. 254. When plaintiff may add *similiter* and make up issue.

Four different ways of making up issues.

The issue should be entitled of the term when issue was joined; but the memorandum should be of the term the declaration was of; and if the cause of action arose Of the manner of making up issue, and herein of the memorandum, &c.

Of the Issue and Paper Book,

arose any time after the first day of term, the memorandum should not be generally of that term, as *Michaelmas term in the 30th year of the reign of King George the 3d, or the like*, but of a particular day in term, as of *Friday next after the morrow of All Souls*; which day should be a day after the cause of action actually arose.

How it operates
as to a tender
made in term.

If, therefore, defendant pleads a tender before the exhibiting of the bill, and plaintiff, in order to oust him of the benefit thereof, makes up paper book with a general memorandum which relates to the first day of term, and would be prior to the tender; on motion upon an affidavit of the fact, court will order a special memorandum to be made. *Smith v. Key*, Str. 638.

Issue, how far
amendable.

Sometimes, indeed, the issue is in such cases amendable. In assault and battery, the memorandum was generally of Michaelmas term, and the fact on *sen assault* proved, was on a day within the term, viz. 27th of October; and a case being made of this, it was held well enough; for the plaintiff needed have given no evidence on this plea, unless to aggravate damages; and the court will not nonsuit him, because it is amendable by a new bill. *Guy & ux. v. Kitchiner and others* Str. 1271.

But memorandum was held not amendable to a special day in term after a plea in abatement, and demurrer and *respondeas ouster* awarded. *Burgefs v. Periam*, Ld. Ray. 324.

Though in the case of *President and College of Physicians v. Salmon*, Holt J. C. said, that memorandum was no part of declaration, and might be amended. Ld. Raym. 683.

Memorandum
must not vary
from pleadings.

So memorandum should agree with declaration, and not say in a plea of debt when declaration is in a plea of covenant or the like; but in such case memorandum is amendable. *Davis v. Stringer*, Carth. 354.

The words of a
plea, &c. not
necessary.

Though the words *de placito*, &c. are usually inserted, yet as the bill itself is afterwards set forth in *hac verba*, they are not absolutely necessary; as was determined in C. B. where, in proceedings by bill, the like memorandum

And of entering the Issue.

random is used, Trin. 7 & 8 Geo. 2. *Atkin v. Worthington un. Sc.*; and in B. R. on writ of error from C. B. Mich. 11 Geo. 2. *Goostrey v. Reynolds*, Andrews 23.

In *assumpsit*, after verdict for plaintiff, a new trial was granted on payment of costs and bringing the money into court, and the rule was to try the same issue. The plea roll in that action was of Easter term; and by the memorandum it appeared, that the bill was exhibited in Hilary term before: but on the new trial, the plaintiff did not proceed upon the same roll, but made up the plea roll as of Michaelmas term, and a memorandum of a bill of Trinity preceding. New trial was had, and plaintiff had a verdict again; but it was set aside for irregularity, the plaintiff not having tried the same cause as it now appeared to be, and had not pursued the rule for a new trial, which was to try the same issue as was tried in the first action. *Harpur v. Davy*, Carth. 498.

If new trial obtained, the memorandums should not be altered, but same roll should be proceeded on.

If there has been a plea in abatement, and judgment of *respondeas ouster*, after which defendant pleads in chief, yet the plea in abatement ought to be entered in the issue, and *nisi prius* record; for, as it is in the plea roll, it must be mentioned in the *nisi prius* record; for otherwise it would not appear to be a trial in the same cause, and judgment would be arrested. *Dobertum v. Chancellor*, Ld. Raym. 329. Carth. 447. 5 Mod. 399.

Where there has been a plea in abatement, it should be entered in issue.

A plea in abatement, which had been demurred to, but never deserted, nor any judgment had upon it, was omitted in the plea roll between the declaration and the plea of *nil debet*; and the court held that this irregularity was cured, by defendant's accepting the issue and paying for it: his objection should have been at that time, it is too late now; meaning in arrest of judgment or on motion for a new trial. *Combe v. Pitt*, Burr. Rep. 1682.

If omitted in plea roll, how cured.

The plaintiff's attorney added the *similiter* to the end of his replication, and delivered the issue, with notice of trial, to defendant's attorney, who received it and did not strike it out, but did not pay issue money; in consequence

Plaintiff may add *similiter*, and if issue money not paid, sign judgment.

D d

consequence

Of the Issue and Paper Book,

consequence of which, plaintiff's attorney signed judgment without giving a rule to rejoin. *Boone v. Eyre*, C. B. T. R. 254.

25. Of Delivery, paying for, and returning Issue or Paper Book.

Of delivering, returning, and paying for issue and paper book.

If the paper book be made up and delivered in term, or within eight days after, defendant's attorney must return it in four; and if the venue be laid in any other county than London or Middlesex, it must also be returned in four days, notwithstanding the time of delivery.

Of the time.

But if the venue be laid in London or Middlesex, and the book is not delivered till eight days exclusive after the end of the term, the defendant has till the fourth day of the next term to return it, as it was too late to give notice of trial for the then sittings after term. In a country cause it is otherwise, where notice of trial might be given in due time for the assizes.

But in all cases, if the plaintiff's attorney accept the book after the limited time, he cannot sign judgment. N. on R. Trin. 1 Geo. 2.

To whom to be delivered.

The issue must be delivered to the attorney or agent in town, and not to the attorney in the country; after an agreement to deliver it to country attorney, it was tendered to agent in town, who refused payment, and judgment was signed and held regular. *Cooke's Rep.* 94.

For such agreement to deliver the issue in the country is void. Bar. 251. *Hafelfoot v. Duke*.

How and when to be paid for.

When the issue is delivered, it must be paid for on demand in all cases in C. B.; but in B. R. if defendant's attorney be absent, plaintiff cannot sign judgment until twenty-four hours after issue left.

In what cases judgment to be signed.

The plaintiff's attorney sent a copy of the issue to the chambers of defendant's attorney, the defendant's attorney and clerk being out, and the porter left in the chambers, the issue was tendered to him, and the money

And of entering the Issue.

ney charged thereon demanded; and he not paying the same, judgment was signed, which was held regular, but was set aside on payment of costs, &c. *Rolt v. Way*, Bar. 253.

But judgment in such case cannot be signed, if plaintiff demands more money for the issue than is due 2 Blac. Rep. 1098, *Atterbury v. Benson*, although it was owing to the mistake of plaintiff's attorney; but as defendant had not tendered what was due, judgment was set aside, but without costs. Not if more money demanded than due.

Judgment was signed, for want of paying for the issue book, and defendant had a rule to shew cause why the judgment should not be set aside. On shewing cause, it appeared that the plaintiff had demanded and charged for the issue book 1s. 8d. more than was due. The court were clearly of opinion that the old doctrine, that defendants must pay whatever was demanded for paper books, ought to be exploded; it is sufficient if they are ready to pay what is really due. Let the judgment be set aside with costs, defendant taking short notice of trial for the third sitting. *Gardner v. Goodal*, Bar. 263.

More money was charged on the issue book than was due, viz. 2s. 4d. for a second copy of the declaration, which was of the same term with the issue, and defendant refusing to pay, plaintiff signed judgment: The court held it necessary that the defendant's attorney should tender the sum due, and, for want of such tender, they discharged the rule, to shew cause why the judgment should not be set aside. *Dean v. Unwin*, Bar. 275. Provided the real sum due was tendered.

Judgment signed for non-payment of the issue book, tendered at the defendant's attorney's house twice at proper hours, though not left there, held to be regular, and rule to shew cause discharged. *Oldham and another v. Lee*, Bar. 275. Sufficient to tender issue, if payment refused.

Motion to set aside judgment for non-payment of the issue, plaintiff's attorney in town not calling on defendant's agent there for a plea: It appeared, on shewing cause, that defendant had pleaded by his country

Of the Issue and Paper Book,

country attorney; thereupon plaintiff's attorney in the country tendered the issue, which defendant's attorney refused to pay for; on which plaintiff's attorney sent to his agent in town to sign judgment, and held good, defendant's attorney having undertaken to be the agent, by pleading in the country. *Moore v. Hodgson*, Bar. 239.

Or to leave it at chambers, &c.

Or, if defendant's attorney not to be found, it may be left in the office.

The issue book was left in the office, and notice left under the chamber door of the defendant's attorney the same day; next day, on finding defendant's attorney at chambers, the plaintiff's attorney gave him notice that the issue book was left in the office, and demanded the money due for the same, which the other refused to pay, insisting that the issue ought to be brought to him; whereupon plaintiff's attorney signed judgment. The court on hearing counsel and the prothonotaries, held that the defendant's attorney must pay for the issue book at his peril: and if he is not to be found, the issue book may be left in the office; and they discharged the rule obtained to set aside the judgment *nisi*, but let the defendant in to try the merits, and set aside the judgment on payment of costs, pleading the general issue, and taking short notice of trial. *Glascock v. Martal*, Bar. 243.

Prisoner appearing in person need not pay for issue.

If a prisoner appears in person, he is not bound to pay for the issue; otherwise if he appears by attorney. *Everall v. Masen*, 2 Wil. 11.

What to be paid for on judgment of respondeas ouster, and issue delivered.

In 1st Sal. 5, it is said, that upon a *respondeas ouster*, if defendant pleads the general issue, the plaintiff shall sign judgment, if the defendant's attorney, upon redelivering back a copy of the issue, will not pay for it: and, it seems, the old course was to deliver in a copy of the whole record, *viz.* the declaration, plea in abatement, &c. and issue; but the court made a rule for the future, that a copy of the declaration and issue should only be paid for. Mich. 1 Ann. B. R.

If judgment signed, same notice serve for inquiry.

If judgment signed, same notice given for trial will serve for inquiry; only notice of the day and hour and place, when and where inquiry will be executed, should be given.

When

And of entering the Issue.

When the paper book is returned, defendant's attorney must pay for all the pleadings on his part, as plea, rejoinder, &c. 8*d.* per folio, and 4*d.* for plaintiff's entries, as replication, or on refusal judgment may be signed, as for want of a plea.

What to be paid for pleadings.

But, if he has not already paid for declaration, you cannot compel him to pay for it on return of book.

If declaration not before paid for, he cannot now be compelled.

If defendant do not return the paper book on the evening of the 4th day, plaintiff may sign judgment; it is a mere indulgence to allow him till the next morning. *Hafelar v. Anfel*, Do. 197.

What time paper book to be returned.

Although in the case of *Oxely v. Bridge*, Do. 67, not long before, it was decided *contra*; but per Lord Mansfield there must have been particular circumstances attending that case, and here the master has certified the above to be the practice. *Ib.*

If, therefore, the rule expires on Saturday, and paper book be not returned till Monday morning, though before the opening of the office, plaintiff may refuse to receive it, and immediately sign judgment. *Thomson v. Ryal*, 4 T. R. 195.

An objection, on account of any omission in the plea roll, comes too late after defendant has accepted and paid for issue; it ought to have been made at that time. *Combe v. Pitt*, Bur. 1682.

Any objection to plea roll too late when issue accepted and paid for.

If the issue is not agreeable to the declaration, but any variance therein, defendant should refuse to accept it; for otherwise plaintiff may make up the *nisi prius* record right, and go on to trial; and, though no defence made by reason of the variance, court will not set aside verdict. *Shepley v. Marsh*, Str. 1131.

In case of any variance, defendant should refuse to accept issue.

Giving notice of trial is no waiver of the right to sign judgment for not paying the issue money, there having been a previous demand. *Jones v. Bryant*, Mich. 34 G. 3. B. R.

Of the Issue and Paper Book,

C.

Of immaterial
and informal
issues,**C. Of immaterial and informal Issues.**

In an immaterial issue, as in debt upon bond for payment of money the 9th February, plea that defendant paid it the 9th January preceding, replication that he did not pay it the 9th January; which issue was immaterial, since he might still have paid it between that day and the 9th February. Defendant shall plead again, though after a verdict for plaintiff, *Anon. Com. 148.*

Issue was tendered by defendant, and the plaintiff joined issue thus: "And the aforesaid defendant does so likewise," instead of saying, "And the aforesaid plaintiff does so likewise;" and this being objected in arrest of judgment, the court over-ruled it, and established the judgment. *Harvey v. Peake, Burr. 1793.*

Where an issue is only mis-joined, judgment shall not be arrested after verdict, it being cured by the express words of 32 H. 8. c. 30.

Debt on judgment in C. B. plea judgment recovered in B. R. replication *nul tiel* record, and the plaintiff delivered the issue, with a day given in it for the defendant to bring in the record at his peril. On which defendant insisted, that the replication of *nul tiel* record should not be delivered in the issue book, and day given to bring in the record, but that the replication ought to be given by itself in form, and a rule thereon to rejoin; and therefore moved, that plaintiff should take back the issue delivered, and deliver the replication in form, and also pay the money he took for the issue. But on shewing cause, the court were of opinion, that a rejoinder in this case is totally unnecessary after a complete issue joined, and that the delivery of the issue was right. Rule discharged. There is no difference between a record of this court pleaded, and a record of another court; the issue is complete on the replication without the rejoinder. *Newbury v. Strudwick, Bar. 335.*

Action

And of entering the Issue.

Action for words. Defendant by leave pleaded four several matters, and the fourth plea was accord and satisfaction. Plaintiff's agent delivered an issue, made up the record, and proceeded to trial, after issues joined on the three former pleas, but without replying or noticing the fourth. Defence was made, but plaintiff obtained a verdict; on which a new trial was moved for, and it appeared that the defendant had given some evidence on the fourth plea, though improper. *Per Cur.* Let the rule be, that the plaintiff do either demur, or reply issuably to the fourth plea. If he demurs, that proceedings be stayed till after argument. If he replies issuably, that a new trial be had at next assizes, and the costs of the former trial and motions attend the event. *Whitehill v. Carr*, Bar. 465.

The issue and *nisi prius* roll may be amended by the plea roll. *Tourville v. Nash*, Say. Rep. 76.

D. Of withdrawing and amending Issue.

D.

Motion to amend the issue roll, by striking out the award of the *venire facias* by *decem tales*, and awarding the common *venire facias*. But there being nothing to amend by, no rule was made. *Cartwright v. Gardener*, Bar. 7.

Of withdrawing and amending issue.

Rule was made absolute, giving plaintiff leave to deliver a new issue properly entitled; in the title of the issue already delivered the word (George) was omitted. It stood thus: Hilary Term, 20th of King the Second. *Beaumont v. Stuart*, Bar. 18.

The want of a similiter was formerly held not aided or amendable. Str. 641. *Cowper v. Spencer*, S. C. 8 Mod. 376.

But a rule was since made absolute, to amend the record after verdict, by adding the words, "And the defendant does so likewise," at the end of the replication, instead of, &c. a prior rule having been obtained, to shew cause why judgment should not be arrested for that defect; which latter rule was discharged. *Sayer v. Pocock*, Cow. 408.

D d 4

The

Of the Issue and Paper Book,

The plaintiff, in the record of *nisi prius*, omitted the words, and the aforesaid plaintiff does the like. After verdict for plaintiff, judgment was arrested; and afterwards plaintiff moved, that the record of *nisi prius* should be amended by the original record; which was granted, as it was only the misprision of the clerk. *Walker v. Lester*, Com. 366. & 2 Cro. 502. & Sal. 47. cited.

C. Of the Continuances on Issue Roll.

Of entering continuances on the roll

Want of continuance in the issue book delivered may be entered at any time on the roll.

In a proceeding by bill in C. P. against a member of parliament, which was of Easter term, and in Trinity following he pleaded the general issue, whereupon issue was joined of that term; the paper book of the issue was made up and delivered, whereby all the proceedings in the cause appeared to be of Trinity term, without any continuance from Easter to Trinity, or any *alias prout patet*, which is irregular; it was moved, that the issue, as delivered, might be set aside for irregularity: *per Cur.* this is a nice objection, it is mere matter of form; and we think the continuance, or *alias prout patet*, are not necessary in the issue paper, it may be entered at any time upon the roll; so the rule to shew cause was discharged. *Wilkes v. Wood*, M. P. 2 Wil. 203.

The declaration was not delivered four days before the end of the term, defendant pleaded to the jurisdiction of the court, and, as he might by the course of the court, pleaded it within the first four days of the subsequent term. The clerk, to avoid the trouble of making up the post roll, entered it with a special imparlance as of the subsequent term, which spoiled the plea; but the clerks were ordered to make up post rolls, and not to use these special imparlances, which Holt C. J. said were crept in of late, and were not known formerly. Sal. 367. 2 Ld. Raym. 1208.

On demurrer to a declaration, one exception was, that the action was discontinued because the declaration was of Michaelmas term, and the plea roll of Easter; and there is no continuance from Michaelmas to Hilary, and from thence to Easter, *sed non alloc*, because, by the course of the King's Bench, they never enter continuances

And of entering the Issue.

nuances until the plea comes in, though the declaration was delivered four terms before. *Curlewis v. Dudley, Ltd.* Raym. 872. Sal. 179.

Though it is the practice to make up the issue and enter it on a roll of that term in which the plea was delivered, yet it has been held, that a plea delivered in one term may be entered as of the subsequent term, with an imparlance, as where,

In debt on bond, plea as to part payment and demurrer *inde*, on which defendant moved, that the action by the demurrer was discontinued, the plea being only to part, and therefore plaintiff ought to have taken judgment by *nil dicit* as to the residue. The court were going to give judgment for the defendant, when it was observed, that the plea was of this term, and therefore plaintiff might still take his judgment by *nil dicit* for the residue: on which defendant alledged, that the plea delivered was of the last term, and therefore the record ought to have been made so; but the clerks certifying that it being only a plea to enter, the record might be made up either way; wherefore the court would not order it to be examined, but said there was trick for trick. *Market v. Johnson, Ltd.* Raym. 1121. Sal. 180.

It was resolved in Wymark's case, 5 Rep. 75. that the course of the King's Bench is, (*i. e.* in suits by bill,) that although the plaintiff after a bar pleaded, have day to reply two or three terms, no mention shall be made in the roll of any imparlance or continuance, but otherwise between the declaration and plea in bar there, if that is of another term, for that shall contain the imparlance or continuance; but no such entry is made upon any replication, rejoinder, &c.; wherefore they shall be intended, when they are generally entered of record, that they were made in the same term in which the bar, &c. was pleaded; and by consequence here the plaintiff may take advantage of a condition contained in a deed pleaded by defendant with a *profert in curia* of a precedent term.

Defendants demand oyer of a charter set forth, a copy of which was accordingly delivered to them; after which they put in their plea of *nil debet*, taking no notice

Of the Issue and Paper Book,

tice of the oyer. The plaintiffs made up the issue, and inserted the prayer and oyer at the end of the plea, and demanded to be paid for it; on which the court was moved to expunge it: for though the defendants had a right to see whether the plaintiffs may sue, yet they are not bound to insert the oyer, but may plead to the merits. And the court held, that the defendants were not bound to set out what they craved oyer of, but that if the plaintiffs would avail themselves of the letters patent being set out at large, they ought to do it by praying them to be enrolled at the head of their replication, and ought not to do it at the defendant's expence, and therefore ordered the oyer to be expunged. *The Weaver's Company, qui tam v. Forrest et al.* Str. 1241. But see of demanding oyer *ante* chapter 7.

§. Of entering the Issue.

Of entering the issue.

In order to compel plaintiff's attorney to enter the issue,

How to compel entry of issue.

In B. R. Get a rule from the master on the back of the issue delivered, enter it with the clerk of the rules, pay 1s. 10d. and serve plaintiff's attorney with a copy, naming the cause, as A. v. B. Friday next after the morrow of the Ascension to enter the issue entered; he must before rule is out, enter the issue on the roll in same manner as explained, *post*, chapter 11. sec. 4. and file same in treasury, or defendant may sign non pros.

In C. B.

Get treasury rule from secondary for him to enter issue on record within four days after notice given, pay 4s. 6d. serve copy thereof on plaintiff's attorney, if not docketted and carried in before rule is out, sign non pros.

But if plaintiff wishes to docket and carry in entry, let him get a roll from the protobotary's of term in which issue is joined, make out 4 warrants of attorney of same term on a plain piece of parchment, file them at warrant of attorney.

Warrant of attorney for plaintiff.

In the Common Pleas, Michaelmas term, in the 34th year of the reign of George the 3d. Middlesex to wit, Richard Tenn puts in his place T. S. his attorney, against John Denn, late of, &c. yeoman, in a plea of trespass on the case.

The like for defendants.

Middlesex, to wit, The said John Denn puts in his place T. S. his attorney, at the suit of the said Richard in the plea aforesaid.

The nature of the action must be expressed on the warrant of attorney.

ney's

And of entering the Issue.

ney's office, pay in debt 8d. in case 1s. 4d. then take roll to prothonotary's, pay for entries 8d. per sheet, and docket same.

By R. M. 5 Ann. no record of *nisi prius* can be sealed or passed at *nisi prius* office by *custos breviarum* before issue be entered, or an *incipiter* thereof, and such entry with *nisi prius* record be first brought to and signed by secondary of this court, for which no fee to be paid but usual fee to clerk of court for entry of issue.

Issues ought to be entered of the term they are joined; but if not entered of that term, it is no reason to set aside the verdict. *Prac. Reg. 232.*

When issue ought to be entered.

But, if the action is not laid in London or Middlesex, the defendant ought not to give a rule for the plaintiff to enter his issue the same term in which issue is joined, unless notice of trial has been given. In a country cause the plaintiff is noways bound to enter his issue the same term it is joined. *Praxis, U. B. 24.* Note on *Reg. Mich. 4 Anne.*

At what time defendant may give rule for that purpose.

If venue in country.

But, if the action is in London or Middlesex, the plaintiff must enter his issue, and bring the record into the office, within four days after notice of the rule for that purpose; and if in the country, before the continuance day of that term, or judgment of *non pros* may be signed. *Ibid.*

If in London or Middlesex.

A *non pros*, signed for want of plaintiff's entering the issue, was set aside, as irregularly signed one day before the time limited for entering the issue by the rule expired. The rule runs, "Unless plaintiff, within four days next after notice, shall cause the issue to be entered," which excludes the day of notice. The rule was served on Friday, and the issue roll brought in on Tuesday following, on which day the *non pros* was signed. *Margarum v. Fenton, Bar. 318.*

How time of the rule to be reckoned.

Plaintiff's attorney had delivered the issue, but not going on to trial, defendant's attorney gave him a rule

If papers mislaid, court will compel defendant's attorney to give a copy of issue.

Of the Issue and Paper Book, &c.

to enter the issue, and on affidavit made by plaintiff's attorney that the papers were mislaid, the court ordered the defendant's attorney to give him a copy of the issue, in order to enable him the better to comply with the rule. *Wiar v. Smith*, Str. 414.

If judgment for want of entering issue, it may be by *nil dicit*.

If judgment is signed for want of entering the issue, or not returning the paper book, it should be by *nil dicit*.

If no proceedings after issue entered, judgment, as in case of a nonsuit.

If plaintiff, after having entered his issue, do not try the cause, or proceed to trial thereon sometime during the next term after that in which issue was joined, judgment, as in case of a nonsuit, may be moved for. *Baker v. Newman*, 1 T. B. 123.

When to be moved for.

But if issue be joined early in term, notice of trial must be given in the same term. *Frampton v. Payne*, 1 T. B. 65.

For the time when plaintiff ought to proceed to trial after entering issue, *vide* Tit. Judgment, as in case of a nonsuit.

Whether if issue roll brought in any time before judgment actually signed, though not in time of the rule, judgment may be afterwards signed.

The plaintiff had a four day rule to bring in the issue roll, which expired the 14th of June last; the defendant on that day searched in the office, and the roll not being then brought in, signed judgment of *non pros* the next day at twelve. The fact was, that the roll was brought in the next morning before judgment signed, and the judgment was held irregular for want of defendant's making another search at the time he signed the judgment: defendant might, indeed, have signed judgment immediately on the first search, but having waived that advantage, plaintiff might bring in the roll any time before judgment actually signed, as in case of a plea, and the like. *Minns v. Bassler*, 2 D & E. 16.

But see the case of *Thomson v. Ryal*, 4 T. R. 195. and *ante* this section C.

SECTION II.

*Of Notice of Trial, and countermanding same;
and of Costs for not proceeding to Trial.*

A. What Notice necessary—

1. *In Town Causes.*
2. *In Country Causes.*
3. *If under Terms to take short Notice.*
4. *When no Proceedings for four Terms.*

B. When Plaintiff is compelled to give Notice of Trial.

C. Of the Form of the Notice, how and to whom to be given.

D. Of continuing Notice of Trial.

E. Of countermanding Notice of Trial.

F. Of Costs for not proceeding to Trial.

By an old rule of court, Mich. 1654, if the *venue* is in London or Middlesex, and the defendant lives within forty miles of London, there must be eight days notice of trial, exclusive of the day it is given, and if he lives *above* forty miles from London, there must be fourteen days notice exclusive.

What notice necessary.
1st, In town causes.

Afterwards, by statute 14 Geo. 2. c. 17. s. 4. it was enacted, That no cause whatsoever shall be tried at the sittings in London or Westminster where the defendant resides above forty miles from the said cities respectively, unless notice of trial in writing has been given, at least ten days before such intended trial.

Statute 14 G. 2. c. 17, explained.

But as there are no negative words in the statute, namely, that there shall be *no more* than ten days notice, and as before this statute, defendant in such case was entitled to fourteen, it has been held that, notwithstanding the statute, fourteen days notice must be given, agreeable to the former rule of court. *Bowler v. Jenkin*, Bar. 305. So that now, in all town causes, if defendant resides within forty miles, eight days notice

of

Of Notice of Trial,

of trial, if above forty miles, fourteen days notice of trial must be given.

Fourteen days,
if beyond forty
miles.

Fourteen days notice must be given, if defendant reside as last aforesaid, although he was arrested in London and venue laid there, and after arrest, and before declaration, he went to Scotland, and although his attorney in London afterwards accepted declaration, and pleaded thereto. *Brind v. Norris*, 12 Blac. 1205.

If in Ireland or
India.

So if defendant's abode is in Ireland, *Gorman v. Boyle*, Bar. 297, or in India, *Douglas v. Ray*, 4 D. & E. 552.

How distance
reckoned.

On such notices, the distance from London is taken by computed miles, not by admeasurement, though so many may be paid for post. *Bates v. Pettipher*, Str. 954. *Osgood v. Lyon*, ib. 1216.

All the defend-
ants must so
reside.

But if there are several defendants, all must reside above forty miles off, for if any one reside within that distance, so long a notice is not necessary. *Per Ash. J.* in *Perry v. Jackson*, 4 D. & E. 520.

2d, In country
causes what no-
tice necessary.

In all country causes to be tried at the assizes, ten days notice of trial at least is necessary. Statute 14 G. 2. c. 17. f. 4.

Notice reckon-
ed one day in-
clusive, one ex-
clusive.

As to the mode of reckoning the days, whether in town or country causes, the day of giving the notice is reckoned exclusive, and the sitting day in town, or commission day in the country, inclusive.

If the sitting day in Middlesex be the 14th, notice of trial on the 6th is good notice; and in a country cause, if commission day be the 4th March, and the February preceding has only twenty-eight days, notice on the 22d of the said February is good.

Sunday how
reckoned.

Sunday is to be reckoned as a day, unless it is the day on which the notice is given.

3d, If under
terms to take
short notice.

Sometimes the defendant is under terms to take short notice of trial, in which case, if it be a town cause, two days notice of trial must be given. *Butler v. Johnson*.

And countermanding same, &c.

per, Bar. 301. If it be a country cause, such notice shall be given four days at least before the commission day, one day exclusive, and the other inclusive. Reg. Edw. 30 Geo. 3. 3 D. and E. 660.

In all causes wherein no proceedings have been had for four terms, exclusive of the term in which the last proceedings were had, a whole term's notice of trial must be given. East. 13 G. 2. N. on R. 4 Ann.

So that where plea was delivered, Hilary term 1783, and no proceedings had till 10th March 1784, when issue was delivered, and ten days notice of trial given for next assizes at Lancaster, it was said by the master, that a whole term's notice should have been given. Imp. B. R. 3d edit. 309.

Where a term's notice is requisite, such notice must be given before the *effoin* day of the term; it is not sufficient if after *effoin* day, though before the first day in full term. *Begg v. Rose*, Str. 1164. *Greale v. Chapman*, Bar. 291.

But if any proceedings have been had within the four terms, such notice is not necessary.

As where notice of trial had been given at the end of half-a-year after issue joined, and then countermanded, there was no necessity of giving a term's notice till a year after such last notice and countermand. Str. 531. *Green v. Gauntlet*.

So if plaintiff take no step in the cause for three terms, and in the fourth sign a *concilium*, and obtains judgment in the fifth term, the signing a *concilium* is taking such a step as to make it unnecessary to give a term's notice. *Bland v. Darley*, 3 D. & E. 530.

So a judge's summons, if an order be obtained thereon, but not otherwise, is deemed a proceeding. R. East. 13 G. 2.

Again, the rule requiring a term's notice, only extends to voluntary delays by the plaintiff, and does not apply where the proceedings have been delayed at defendant's

4th, What notice where no proceedings for four terms.

It must be a full term's notice.

But not necessary if any proceedings had;

as notice of trial given though countermanded;

or concilium signed in the cause;

or an order on a judge's summons.

Not necessary if cause delayed by defendant's request;

Of Notice of Trial.

defendant's request. *Hosworth v. Philips*, Blac. 784. *Bland v. Darley*, 3 D. and E. 530.

or by injunction obtained by him;

Thus if defendant suspends the cause for a year by an injunction, and afterwards plaintiff proceeds to trial without a term's notice, and obtain a verdict, court will not set it aside. *Hayley v. Riley*, Do. 71. *Hosworth v. Philips*, Blac. 784.

or by special agreement between the parties.

So if proceedings have been staid by agreement for a limited time to enable defendant to pay the debt, on default of which plaintiff was to proceed; this is out of the rule of court, and in such case, at whatever stage of the cause the agreement might be made, the proceedings may be renewed at the expiration of the time without a term's notice, else it would, in effect, be a stay of proceedings for a whole term beyond the time agreed on. *Watkins v. Heydon*, Blac. 762.

B.

B. When Plaintiff is compelled to give Notice of Trial.

When plaintiff is compelled to give notice.

By the practice of the King's Bench, altho' issue may be joined early enough in the term for plaintiff to give notice of trial for the sittings after or for the next assizes, he is not bound so to do; the rule being, that no notice of trial need be given until the term succeeding that in which issue was joined. *Hall v. Buchanan*, 2 D. & E. 734.

Not till the next term after issue joined.

In C. B. otherwise.

But in the Common Pleas, plaintiff must give notice of trial the same term, if issue is joined early enough in the term to give such notice—*ib. Frampton v. Payne*, 1 C. B. T. R. 65.; but he has the whole of the next term after issue is joined to try his cause in. *Baker v. Newman*, 1 C. B. T. R. 123.

Notice necessary, though day fixed for trial;

Notice of trial must be given by the plaintiff, notwithstanding a special day is fixed for the trial by rule of court. *Ellis v. Trusler*, Blac. 798.

or plaintiff hath undertaken peremptorily.

And although the plaintiff hath undertaken peremptorily to proceed to trial at the next assizes, yet it is necessary for him to give notice of trial: and if without

such

And countermanding same, &c.

such notice defendant attends with his witnesses, &c. and plaintiff does not proceed to trial, and defendant afterwards obtains judgment as in case of a nonsuit, he will not be allowed his costs for attending and subpoenaing witnesses and the like; *Ifield v. Weeks*, 1 C. B. T. R. 222.

C. Of the Form of the Notice; and to whom to be given.

In (naming the court,) *between* A. B. plaintiff, *and* C. D. defendant.

Take notice of trial in this cause for the sitting after this present Hilary term, to be holden at Westminster Hall in and for the county of Middlesex, (or as the case may be,) specifying if it be at the assizes, roben and where to be holden, as for the next assizes to be hold at in and for the county of Your's, &c.

Yours, &c. defendant's attorney.

Plaintiff's attorney.

Of the form of the notice, how, and to whom to be given;

This notice may be given on the back of the issue, or afterwards on a separate piece of paper.

on back of issue or piece of paper.

There is no settled precise form of notice required. It is sufficient if it apprises defendant with certainty that plaintiff means to proceed to trial; it is indifferent whether he says, I *renew* or I *continue* the former notice, (even though the former notice be a bad one and not capable of continuance,) provided there be sufficient time, according to the rules of the court, given by the last notice: *Tyer v. Strepton*, Blac. 1298.

No precise form required.

At the back of the issue was written, Take notice of trial at the next assizes; and, though there was no date or county or attorney's name mentioned, yet, being indorsed on the back of the issue, the court held it good; but that it would not be so on a separate paper. *Henbury v. Rose*, Str. 1237.

Not so strict in form if on issue.

If plaintiff concludes to the country on defendant's plea, he may give notice of trial on the back of the pleading, C. B. Trin. 2 Geo. 1.; and, if the special plea be afterwards waived and general issue given, the notice which

When plaintiff may give notice on the pleadings, and for what it shall serve.

Of Notice of Trial,

which was given on the special issue shall serve for the trial of the general issue.

Notice of trial upon the issue shall serve for notice of executing a writ of inquiry if the book is returned with a demurrer, Hil. 8 G. 1. B. R. Hil. 6 G. 1. C. B.; but then plaintiff ought to give notice of the time and place of executing the inquiry.

To whom notice of trial to be given;
to the attorney;
to defendant;

Notice of trial must be given to defendant's attorney, or his agent, if he has appeared, or is known, *Lee v. Bradford*, Bar. 300.; but, if not known, it may be given to the defendant himself. *Harding v. Stafford*, Say. 133. *Higgins v. Stewart*, Cooke 62.

to the agent.

If the notice of trial be given on the issue book, it must be given to the agent in town, because the issue can be delivered no where but in town; but, if given afterwards, it may be given either to the attorney in the country or the agent in town. So may countermands of notices of trial, or notices of executing writs of inquiry, or countermands. *Tasburn v. Havelock*, Bar. 306.

Attorney must acquaint his client thereof, or attachment will go.

Defendant moved the court for an attachment against his attorney for not acquainting him that he had received notice of trial, whereby plaintiff obtained a verdict without defence. It appeared, on shewing cause, that the omission was owing to the neglect of the attorney's agent; but the court held that to be no defence for the attorney, as he is answerable to his client, and his agent to him; the party in this case ought not to be put to his action, but the matter should be determined in a summary way. Let an attachment go. *Collins v. Griffin*, Bar. 37.

D.

D. Of continuing Notice of Trial.

Of continuing notice of trial.

By R. Mich. 1654. C. B. and N. on R. in 4 Ann. B. R. if notice of trial be given in London or Middlesex for one sitting, and plaintiff be not prepared to proceed, if he give notice before that sitting that he will try it the next sitting, that shall be held a convenient notice.

The

And countermanding same, &c.

The idea of *continuing* notices of trial arose from the above rules; which allow a plaintiff who has given notice of trial at one sitting, (but finds himself unprepared,) to give fresh notice for the next sitting, though the intermediate time should be less than the rules of the court require upon an original notice; but the word *continue* is not to be found in the rule, so that it is not a technical term, but a mere colloquial expression. *Tye v. Stevenston*, Blac. 1299.

Its origin.

A continuance, therefore, operates as a short notice of trial; for if there be time to countermand and give fresh notice, there is no occasion for a continuance.

Its operation.

Notice of trial, therefore, can only be continued in causes to be tried in London or Middlesex, as well, indeed, by the words of the rule, as by the reason of the thing; for in a country cause, if not tried at the first assizes, there is time to give fresh notice before the next. So it can only be (properly speaking) from one sitting in term to the next, or from the last sitting to the sitting after term; and not from the sittings after term to the sittings in the following term, as in such case there is time to give fresh notice, *Prac. Reg.* 396.; but yet where such notice of continuance was given, as the time was sufficient, the word *continue* was held not to vitiate it, and therefore it was deemed good. *Bys v. Twist*, Bar. 292.

When continuance can be given.

How operate as fresh notice.

The plaintiff cannot continue his notice of trial a second time; that is, he shall give short notice of trial but once. *Ib. Green v. Gifford*, Str. 1119.

No continuance a second time.

Notice of continuance must be delivered within the same time as notice of countermand. Str. 1119.

At what time to be delivered.

There must therefore be two days notice of continuance, Monday for Wednesday. *Price v. Bambridge*, Bar. 297.

Plaintiff's attorney gave notice as follows: I hereby countermand my notice of trial given for the second sitting within this term, and continue the same till the third sitting, &c.; defendant made no defence, and moved to set aside the verdict. *Per cur.* after a notice

Cannot continue after countermand.

Of Notice of Trial,

is countermanded it cannot be continued, the verdict must be set aside. *Smith v. Hoff*, Bar. 301.

A good continuance of a bad notice of trial, will not avail, though a former good notice of trial had been given.

Proper notice of trial was given and countermanded; a second notice was given, but therein the name of the cause was omitted. The second notice was afterwards continued, and the name of the cause inserted in the continuance, and thereupon the cause was tried. The court was of opinion that the second notice, being bad, could not be helped by the continuance, and set aside the verdict.

The form of notice of continuance may be as follows:

Form of continuance.

Mr. ———

Take notice, that I do hereby continue the notice of trial given you in this cause for the first sittings in this present Hilary term to the second sittings in the said term. Dated day of 18 .

To Mr. ———

Your's, &c.

Defendant's attorney. T. S. plaintiff's attorney.

C. Of countermanding Notice of Trial.

Of countermanding notice of trial.

If the cause is to be tried at the sittings in London or Westminster, and defendant resides within forty miles of London or Westminster, two days notice of countermand before it is to be tried, is sufficient.

When notice must be countermanded.

But if the cause is to be tried at the sittings, and defendant does reside above forty miles, then six days notice of countermand is necessary. 14 G. 2. c. 17.

In all country causes to be tried at the assizes, six days notice of countermand is necessary. 14 G. 2. c. 17. The above is the time in both courts.

Different from the old practice.

But before the above statute of 14 G. 2. the practice as to the time of countermanding in country causes was very different. In C. B. two days before commission-day held good, *Goodright v. Hoblyn*, Bar. 298; and in K. B. four days before the assizes, *Whitlock v. Humphreys*, Str. 849.

The

And countermanding same, &c.

The two or six days of countermand, as above, are to be reckoned one inclusive and the other exclusive, *How the days reckoned.*
Str. 849. *Whitlock v. Humphreys.*

No such notice must be given on a Sunday. *Dighton v. Dalton, Cook 15.* *Not given on Sundays.*

But in C. B. notice of countermand, in a town cause, given on Saturday for the Monday was held good. *Whether Saturday for Monday good.* *Stafford v. Thompson, Prac. R. 395.* But Mr. Impey, in his Practice of C. B. 331, doubts its regularity.

A countermand of notice of trial may be given to the attorney in the country. *Tasburn v. Havelock, Bar. 306.* *To whom to be given.*

The form of notice of countermand.
In the (mention name of court) A. B. plaintiff, and C. D. defendants.

Take notice, that I do hereby countermand the notice of trial given you in this cause. Dated, &c. *Form of countermand.*

Yours, &c. T. S. plaintiff's attorney.
To Mr. W. S. defendant's attorney.

After trial and verdict for plaintiff, defendant moved to let it aside for irregularity in notice of trial; but he had, since the verdict, given a rule to tax costs thereon. Gould and Nares Just. held that to be a waiver of the irregular notice; but no opinion was given thereon, as the officers of the court doubted, and judgment was given on another point. *Tyte v. Steventon, Blac. 1208.* *Q. What a waiver of irregular notice.*

If plaintiff give notice of trial, and does not proceed on that notice, by going to trial accordingly, or continuing, he cannot try the cause without new notice as before, unless by consent or rule of court. R. M. 1654. *When new notice necessary.*

But if cause was made a *remanet*, no occasion for new notice, defendant is bound to attend till it is tried. *When not.*

F. Of Costs for not proceeding to Trial.

In case plaintiff gives notice of trial, and does not go to trial accordingly, the defendant upon motion shall have *Of costs for not proceeding to trial.*

Of Notice of Trial,

have his costs of attendance, &c. taxed, unless the plaintiff countermand his notice in convenient time, or shew cause to be allowed by the court in excuse of such costs. N. on R. Mich. 1654.

How far court will stay proceedings on fresh notice till costs of first are paid.

If plaintiff gives notice, and does not proceed to trial, whereby costs are taxed for defendant, and afterwards gives fresh notice, (perhaps with design to put defendant to further costs,) yet the court will not stay the trial till the first costs are paid, (except in ejectment,) because the defendant has remedy for them; and if the plaintiff should not try the cause pursuant to his second notice, the defendant will again have costs, and the like remedy to obtain them. N. on R. Mich. 4 Ann. but see the case of *Smith v. Lidcat*, post N.

In what cases, and by whom costs to be paid.

If defendant enters a *ne recipiatur*, costs are to be paid, because the default is in plaintiff in not entering his cause in due time. *Duel v. Stow*, P. R. 406.

If both plaintiff and defendant give notice of trial, and neither go on to trial, both will be entitled to costs. *Reading v. Grafton*, P. R. 405.

Executor liable.

An executor plaintiff is liable to these costs, as well as other plaintiffs. *Ogle v. Moffatt*, Bar. 133.

If a cause goes off *pro defectu juratorum*, or at a future trial defendant obtains a verdict, he shall be allowed on taxation the costs of the first attendance, &c. as either plaintiff or defendant might have prayed a tales; and this in both courts. *Sparrow v. Turner*, 2 Wil. 366.

When costs not allowed, if a countermand.

But if there has been a regular countermand, no costs allowed.

If any excuse.

Or if plaintiff can shew a reasonable excuse.

As where it appeared that one material witness was served with a subpoena, and could not attend, and another was disabled by a fall from his horse, plaintiff not being guilty of any wilful default. *Ogle v. Moffatt*, Bar. 133. Or that two of his witnesses were disabled by the gout. *Jones v. Stephenson*, ib. 316.

Costs

And countermanding same, &c.

Costs not allowed for a witness who set out before countermand of notice of trial, which was given in time. *Hester v. Hall*, Bar. 307.

Nor where the cause is made a *remanet*, or referred, unless agreed to abide the event of reference. *Bracher v. Cotton*, Cook 131. If cause be a remanet.

A pauper not liable to such costs, but you may move to dispauper him. *Taylor v. Lowe*, Str. 983. Pauper not liable.

If defendant obtains a rule for costs for not going to trial, he shall not have a rule for judgment, as in case of a nonsuit. *Ogle v. Moffatt*, Bar. 316.

But if any subsequent laches is made, a judgment as in case of a nonsuit may then be applied for.

If defendant wishes to move the court against plaintiff for costs for not proceeding to trial, proceed as follows: How to proceed for costs for not going to trial.

In B. R.

Prepare affidavit, stating, "That the action was commenced in Michaelmas term; that in Hilary term issue was joined, and notice of trial given thereon for the sittings after the said term; and that plaintiff did not proceed to trial, nor countermand such notice."

Give brief to counsel, with affidavit annexed, to move for rule, which is granted in first instance, see 10s. 6d. Get rule from clerk of rules, and an appointment from master to tax the costs; if not paid on demand, made by defendant's attorney on plaintiff himself, move for an attachment (on affidavit * of such

In C. B.

Get treasury rule of secondary, or give brief to serjeant, with 10s. 6d. fee to move for rule, which is granted of course; an affidavit is not necessary in the first instance. Get appointment of prothonotary to tax costs, and serve the same with copy of rule on plaintiff's attorney. At the time of attending prothonotary, agreeable to appointment, carry an affidavit similar to that in the K. B. and proceed in the same after taxation of costs, to demand same of plaintiff, and on refusal to make affidavit * thereof, and move for attachment for not paying costs, in pursuance of prothonotary's allocatur; serjeant's fee 10s. 6d. The attachment is signed

* Form of affidavit.

A. B. of, &c. and E. F. of, &c. severally make oath, and say, and first this deponent A. B. for himself saith, That on Monday last he did per-

Form of affidavit.

Of Notice of Trial.

such demand and refusal, for signed by the prothonotaries, not paying costs, agreeable to and is made returnable on a day the master's allocatur. It is certain; the proceedings are by absolute in first instance, and original.

When obtained must be carried to the crown office, where all attachments will be made out; your own officer will execute it; pay him one guinea.

The demand of costs to be paid, must be at the same time the rule is served. *Britton v. Dickinson*, Bar. 120.

How rule may be drawn up.

The rule may be drawn up payable to the defendant or his attorney; but if payable to both, and the money on demand is refused, the defendant and his attorney must join in the affidavit for an attachment.

By whom affidavit to be made.

When the costs are taxed, a demand must be made by the defendant, if the rule is payable to him; if to either him or his attorney, either may make the demand; but, in such case, both should join in the affidavit, the one swearing to the demand and refusal, and the other negating the receipt of the money. Imp. C. B. 339.

The affidavit * for an attachment must be drawn with correctness.

What it must state:

It must state that the defendant was served personally with a rule, and that the original was shewn to him at the same time. *The King v. Smithies*, 3 D & E. 351.

It must shew the day of service and demand precisely; — "on or about such a day," not sufficient. *Bratt* against *Wadham*, 2 Wil. 227.

personally serve the above-named plaintiff with a true copy of the rule, and the master's (or prothonotary's) allocatur thereon, hereto annexed, and at the same time shewed him the said original rule, and allocatur thereon; and that he this deponent then demanded of him the costs allowed by the master (or prothonotary) on the said rule, but that the said plaintiff did not then, nor at any time since, pay the same to this deponent; and the same now remains unpaid to this deponent. And this deponent E. F. for himself, saith, That he hath not received the said costs, or any part thereof, but the same now remains due and unpaid to this deponent.

* See preceding note.

But

And countermanding same, &c.

But it may be amended if insufficient. *D.*

It may be amended.

Defendant moved, that plaintiff might not go on to trial without first paying the costs of a former notice. The court at first seemed to think, that defendant ought to have applied by way of attachment for the plaintiff's not paying costs; but yet, as it appeared the plaintiff was already in custody, so that the attachment would be but of little service, the court made a rule to shew cause why he should not be hindered; which was afterwards made absolute. *Smith v. Lisdote*, 1 Barn. 44.

Where court will stay proceedings, and not compel defendant to sue out attachment.

SECTION III.

Of carrying down the Record by Proviso.

It is in general true, that the defendant in any action is not entitled to a writ of *nisi prius* unless the plaintiff has made default in proceeding to trial; but in every action wherein the defendant is equally an actor with the plaintiff, as in replevin, prohibition, and *quare impedit*, the defendant may sue out a writ of *nisi prius* although plaintiff has not made such default.

In what cases to be had.

And this is called carrying down the record to trial by proviso; because in the *venire facias* directed to the sheriff, there is a proviso to the following effect: "And have there the names of the jurors and this writ; provided always, that if two writs shall thereupon come to you, one of them only you return and execute," &c.

Why so called.

By stat. 7 & 8 Wm. 3. c. 32. if any defendant be minded to bring the issue to trial, (when, by course in any of the said courts, he may lawfully do the same by proviso,) he may of the issuable term next preceding such intended trial to be had at the next assizes, sue out a new *venire facias* to the sheriff by proviso, and prosecute the same by writ of *habeas corpus*, or *distringas*, with a *nisi prius*, as though there had not been any former *venire* sued

Of the statute 7 & 8 Wm.

Of carrying down the Record by Proviso.

sued out or returned in that cause, and so *toties quoties* as the matter shall require.

Formerly usual remedy.

Formerly, therefore, trial by *proviso* was the only way defendant had to get rid of an action if plaintiff neglected carrying the record down to trial. And this was done by obtaining a rule upon such default made by plaintiff, for record to be made up by *proviso*.

Now superseded by stat. 14 G. 2.

But now the old mode of trial, except in certain cases, is superseded by the more summary mode of moving for judgment, as in case of a nonsuit: which remedy, in case plaintiff does not proceed to trial, according to the practice of the court, is given by stat. 14 Geo. 2. c. 17.

but only in certain cases.

I say it is superseded, *except in certain cases*, for the statute does not extend to all cases, but only to those wherein plaintiff has been guilty of a default in not proceeding to trial, and wherein defendant at common law was entitled to try by *proviso*, by reason of such default.

When still necessary,

if both parties are actors;

In all cases, therefore, where both parties are actors, and where defendant, in the first instance, is entitled to try by *proviso*, defendant must still resort to trial by *proviso*, and cannot have judgment as in case of a nonsuit; for in such, plaintiff is no more obliged to carry down the record than defendant; as in actions of replevin. *Jones v. Concannon*, 3 D. & E. 661.

if statute has been complied with,

So wherever the statute has been once complied with, though a subsequent default should be made by plaintiff, defendant must resort to his common-law remedy of trial by *proviso*.

and record once carried down.

Now the statute is complied with, by the plaintiff having once carried down the record to trial.

In all cases, therefore, where this has been done, though the cause was not determined at the trial, and it may be necessary for the final decision to carry it down again, yet if plaintiff should neglect so to do the second

Of carrying down the Record by Proviso.

second time, defendant cannot have judgment as in case of a nonsuit, but must resort to the trial by *proviso*; as where plaintiff was nonsuited at the trial, but nonsuit was afterwards set aside, and plaintiff neglected to go to trial again. *The King v. Pippett*, 1 D. & E. 492.

So where the cause was made a *remanet* by defendant's consent. *Newburn v. Langley*, 3 D. & E. 1.

So where plaintiff obtained a verdict, but the verdict was afterwards set aside. *Porzelius v. Maddocks*, C. B. T. R. 101.

Trials by *proviso*, therefore, are still frequently necessary.

To carry down the record by *proviso*, a rule for that purpose must first be obtained—" *Fiat nisi prius per proviso si querens fecit defaultam*," which is given by the master at the back of the issue, and entered at clerk of rules. *Dodson v. Taylor*, Str. 1055.

Rule for trial by *proviso*.

But this rule need not be got before notice of trial is given; it is sufficient if defendant has it any time before the trial; for the only use of it is, that if two records are carried down to trial, the one by plaintiff and the other by defendant, the former only should be tried. *The King v. Pippett*, 1 D. & E. 696.

When it must be obtained.

Indeed, in criminal trials, where the defendant carries the record by *proviso*, no such rule is obtained at all. *Ibid*.

Notice in criminal cases;

And in the case in Str. 1055. above cited, though nonsuit was set aside in a civil cause for want of such rule, yet it was then said to be the old practice, but generally discontinued. In the case of *Proude & Williams*, before that period, trial was set aside for want thereof. 1 Barn. 18.

otherwise in civil.

If defendant proceeds by *proviso*, he must give the same notice of trial in all cases, as plaintiff would have been obliged to give, R. East. 1651. *Swale v. Leaver*, C. B.

What notice of trial necessary.

Of carrying down the Record by Proviso.

C. B. P. R. 388.; and if after notice he does not proceed to trial, nor countermand in due time, he is liable to pay plaintiff his costs. *The King v. Pippett*, 1 D. & E. 696.

If both parties give notice.

If defendant gives notice of trial by *proviso*, and plaintiff also gives notice, and neither of them proceed, both shall be entitled to their respective costs. *Reading v. Grafton*, P. R. 305.

Court, on motion, will suffer defendant to carry down record to try issue out of chancery.

There was an issue directed by the court of chancery, which defendant was desirous of trying, but which (it was suggested) plaintiff wished to delay; and, on that ground,

Gibbs moved, that the defendant might be at liberty to carry the record down to trial at the next assizes; observing, that by the common law defendant could not carry it down by *proviso*.

The court thought the application reasonable, and granted the rule absolute in the first instance; saying, that the plaintiff would not be damaged by it, for that if he chose to take the record down himself, the costs of this application must be paid by defendant. *Humpage v. Rowley*, 4 D. & E. 767.

SECTION IV.

Of putting off the Trial.

Trial, when it may be put off.

"There is no crime so great," said Lord Mansfield (Blac. 514.) "nor proceedings so instantaneous, but that upon sufficient grounds the trial may be put off." But of this sufficiency the court will be first well satisfied.

Usual ground, absence of witness.

The most usual ground is the absence of a material witness, and even in this instance it is only allowed under particular restrictions.

Of the affidavit in such case.

There must be an affidavit of the fact; and thereby it must appear, 1st, That the witness is really a material one for the defendant in the cause; 2d, That the party who applies has not been guilty of any neglect in procuring

Of putting off the Trial.

procuring him; and, 3dly, That there is a reasonable expectation of his returning by the time to which the trial is prayed to be put off.

1st, The mere swearing that the witness is a material witness, as deponent believes, without any thing further, was held insufficient, *Gray v. Halton*, Bar. 437. And even where the affidavit was, "That A. B. and C. D. are material witnesses for defendant in this cause, without whose evidence defendant cannot safely proceed to trial, as defendant is advised and verily believes," was held bad; because the belief seemed to go through the whole, as well to A. B. and C. D. being material witnesses as to the other necessary part of the affidavit, that the party cannot safely make defence without their testimony; the former part, respecting A. B. and C. D. being material witnesses, ought to be positively sworn; belief as to it is not sufficient, but as to the latter part it is. *Day v. Samson*, Bar. 448.

1st, It must be sworn witness is material.

The usual way, however, now of making this part of the affidavit is, "That A. B. of, &c. is a material witness for him this deponent in the said cause, as he is advised, and believes to be true, and that he cannot safely proceed to the trial thereof without the testimony of him the said A. B." See form of affidavit, post.

2d, Party applying must have been guilty of no laches.

2d, Party must have been guilty of no laches.

Where it appeared that the witness who was sworn to be a material witness went out of town or abroad, after the notice of trial was given, the court would not put off the trial for it, as the defendant might have subpoena'd him in time. *Bourne v. Church*, Bar. 442.

3d, There must appear reasonable expectation of witness's returning in time.

3d, There must be reasonable expectation of his return.

Where the witnesses are foreigners, special ground ought to be shewn of the probability of their return, as the presumption is, that they will not come back. So if

If a foreigner.

Of putting off the Trial.

if they are in the army, and cannot come without special permission; or, in general, if they are gone to reside abroad, or the like, special reasons should be assigned why they are likely to return. *Rex v. D'Eon*, Blac. 515.

For the above cases differ from the ordinary cases of English witnesses being accidentally gone abroad, or gone for a small time only, and expected to return to their own country, their natural home and residence. *N. Burr.* 1516.

If gone abroad
for length of
time.

And even in those cases, if the witness is likely to stay any time, as where one was gone to the East Indies for eighteen months, court will not grant rule nisi on common affidavit, but defendant must make a special case, stating the nature of the demand, and what it is the witness can prove; which, if the court do not think sufficient, they will not put off the trial. *Lord v. Cooke*, Blac. 436.

If any suspicion
in the case.

If the usual form of affidavit is observed, and there is no special ground of suspicion, the rule goes of course; but if there be such ground, it is refused, unless the party will go into further and minuter circumstances; or if it appear that there is an affected delay, the rule is also then refused. *Rex v. D'Eon*, Blac. 514.

For men take such latitude to swear in the common form, that where a suspicion arises from the nature of the question, or from contrary affidavits, the court will examine into the ground upon which the delay is asked, and this both in criminal and civil cases. *Ib.* *Burr.* 1514.

Who may make
affidavit.

It was formerly held, that defendant himself must, and that no third person could make the affidavit. *Easter v. Uppington*, Bar. 437.

But this strictness was afterwards dispensed with, as there were many cases where a third person could swear a witness to be a material one, and defendant himself could not; as where a factor sells goods for his principal, and employs a porter to deliver them, the factor knows

Of putting off the Trial.

knows the porter to be a material witness, but the principal does not. *Day v. Sampson*, Bar. 448.

But generally speaking defendant must make affidavit.

The motion for putting off the trial ought to be made two days at least before the day of trial. *Bourne v. Church*, Bar. 442. *Sellon v. Chamberlayne*, Bar. 444. *Roberts v. Kilborough*, Bar. 433.

When motion to be made.

But when it appeared the fact of the witness being material, did not come to defendant's knowledge time enough to move two days before the last day appointed for trial, it was put off, though cause was called on and made a *remise* by consent. *Hart v. Whitlock*, Bar. 452.

Exception to rule.

The usual practice is for the trial to be put off till the next term, and not for a longer period; when plaintiff must apply again, if he finds it necessary. *Stratford v. Marshall*, Bar. 440.

To what time trial generally put off.

In the above case, indeed, it was put off for a longer time, on affidavit that defendant would not return before; but there is a note saying, that the common practice was otherwise.

On motion to put off a trial, the court suffered affidavits to be read taken before a vice-consul abroad. Such affidavits are constantly received and read at the council board; nor is it reasonable to expect that such sort of affidavits should be taken before commissioners. *Corry v. Kennedy*, Bar. 466.

Affidavits read, though not taken before commissioner.

But in other cases, if justice requires it, the court will put off the trial.

Trial was put off because the attorney for defendant was so ill as not to be able to attend. *Hayley v. Grant*, Say. 63.

Trial put off because attorney was ill.

In K. B. it does not seem absolutely necessary to give notice of the intended motion, as it is merely a rule to shew cause, but it is the best way to do so. In C. B. notice and affidavit of service is necessary.

How to proceed in obtaining rule to put off trial.

Of putting off the Trial.

Notice may be to the following effect :

In A. B. defendant, against C. D. plaintiff.

Form of notice
of motion.

Take notice, that this honourable court will be moved on next, or to-morrow, as the case may be, or so soon after as counsel can be heard, that the trial of this cause may be put off until next term, on account of the absence of a material witness on behalf of defendant. Your's, &c.

Then prepare affidavit (which should be made by defendant, unless abroad or under special circumstances) as follows.

In the A. B. plaintiff, and R. D. defendant.

Form of affidavit.

I, S. of, &c. the defendant in this cause, maketh oath, and saith, that issue was joined in this cause this present Hilary term, and that notice of trial was given for the last sittings within the said term : and this deponent further saith, that R. W. late of, &c. is a material witness for him this deponent in the said cause, as he is advised, and believes to be true ; and that he cannot safely proceed to the trial thereof without the testimony of him the said R. W. : and this deponent further saith, that he hath endeavoured to find the said R. W. ; that he hath been to the house of the said R. W. and was informed that he was gone to Norwich in the county of Norfolk, and that he this deponent hath sent there for the purpose of subpoenaing him ; but that the said R. W. is gone from thence, as this deponent hath heard, and verily believes to be true ; and that he this deponent cannot get any information where the said R. W. is, but is informed, that he will be at home in two months ; and that he this deponent expects to be able to procure the presence of the said R. W. within the first sittings of next Easter term.

Having obtained rule *nisi*, serve copy on plaintiff's attorney, shewing the original rule ; and if no cause shewn, make rule absolute in usual way, on affidavit of such service.

SECTION V.

Of making up the Record, suing out Jury Process, entering Cause for Trial, and of Remanets.

A. Of making up the Record for Trial, and passing same.

B. Of suing out Jury Process, *Venire, Disfringas, Habeas Corpora Juratorum, &c.*

C. Of entering Cause for Trial.

D. Of the Cause being made a *Remanet*.

The *nisi prius* roll, or record, contains all the pleadings *verbatim*, awards of jury process, and other things in the course of the cause, engrossed on a sheet of parchment, with a double half-crown stamp; it is now made up by the attorney, though formerly by the clerks in court.

3. Of making up record for trial.

The *nisi prius* record is made up in the following manner:

In B. R.

(When by bill.)

Pleas before our Lord the King at Westminster, of Michaelmas term (the term in which issue is joined,) in the thirty-fourth year of the reign of our Sovereign Lord George the Third, by the grace of God, &c. and in the year of our Lord 1794.

Roll 410, Mansfield & Way.

Buckinghamshire, to wit. Be it remembered, &c. (copy the memorandum and the whole issue from the issue or paper book *verbatim* to the end of the award of the venire, and day given,

In C. B.

(When against indifferent persons not privileged,) prothonotaries' names.

How *nisi prius* record made up.

If a country cause.

Pleas at Westminster before Sir James Eyre knight, and his companions, justices of our Lord the King of the bench, of Hilary term, in the 34th year of the reign of our Sovereign Lord George the Third, by the grace, &c.

Roll 350.

Buckinghamshire, C. L. late of &c. gentleman, was attached to answer R. R. of a plea, &c. and whereupon the said R. complaineth, that

The number of the roll got, at time of entering issue; for which see ante, sec. 2. D. of this chapter.

F f whereas,

Of making up the Record.

given, &c. (then enter another placita in this manner.)

whereas, &c. (to the end of the issue and award of venire.)

For the reason why, in B. R. there is a second placita, and not in C. B. See Appendix N.

Pleas before our Lord the King at Westminster, of the term of Saint Hilary, (the term the cause is to be tried,) in the 34th year of the reign of our Sovereign Lord George the Third, by the grace, &c. and in the year of our Lord 1794.

In this court the placita is written but once, at the beginning, unless on a change * or death of the chief justice, or an old record, in which case a second placita is written of the term in which the cause is to be tried; therefore a space for such placita should be left.

(a) The return of the distringas in B. R. and habeas corpora juratorum in C. B. and which should be the next return after day of trial.

Buckinghamshire, to wit. The jury between A. B. by his attorney, plain'tiff, and C. D. defendant, of a plea of trespass on the case, (or as the cause of action may be,) is respited before our Lord the King at Westminster, until (a) unless his Majesty's justices assigned to hold the assizes in the county aforesaid, shall first come on (the day of assizes) at (the place where holden,) in the said county, according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors to make the said jury between the parties aforesaid at the same place: And be it known, that the writ of our said Lord the King in this case upon-record, was delivered to the under sheriff of the county aforesaid, the day of

to wit. The jury between R. R. plaintiff and C. L. late of &c. gentleman, in a plea of (as the case may be,) is respited here until (a) unless our Lord the King's justices assigned to take the assizes in the county aforesaid, by form of the statute in such case made and provided, shall come before, on (the day of the assizes,) at (the place where to be holden,) in the county aforesaid, for default of the jurors, because none came; therefore let the sheriff have the bodies of the several persons mentioned in the panel annexed to the writ of habeas corpora juratorum: And be it known, that the justices here in this same court in this term, delivered a writ thereupon to the deputy of the sheriff of the county aforesaid, to be executed in due form of law, &c.

(the

* Form of placita on the removal of the chief justice in term: Pleas at Westminster before Sir James Eyre knight, and his brethren, justices of his Majesty's court of Common Bench, in fifteen days of Easter, in three weeks from the day of Easter, and in one month from the day of Easter; and before Sir Henry Gould knight, and ——— Heath knight, justices of the said court, from the day of Easter, in five weeks in Easter term, in the 34th year of the reign of our Sovereign Lord George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c.

Of making up the Record.

(the last day of the term the last placita was of,) in this same term, before our Lord the King at Westminster, to be executed according to law at his peril.

If the cause is a town cause, to be tried either at Westminster Hall or Guildhall, record is fame *mutatis mutandis*, only *jurata* will be as follows:

How nisi prius record made up, if a town cause.

In B. R.

Middlesex, to wit. The jury between A. B. plaintiff and C. D. defendant, in a plea of *respite* before our Lord the King at Westminster until, &c. (the return of *distringas*,) unless the right honourable Lloyd Lord Kenyon, his Majesty's chief justice assigned to hold pleas before the King himself, shall first come, on (the day of the sittings,) at Westminster Hall in the said county, according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear.

In a town cause, the scien- dom at the end of the *jurata* is omitted in B. R.

In C. B.

Middlesex, to wit. The jury between R. R. plaintiff, and C. L. late of *Sc. gentleman*, in a plea of *respite* here until in fifteen days of the day of Easter, (return of *hab. corp. jur.*) unless Sir James Eyre, the King's chief justice of the bench here assigned by form of the statute in such case, shall come before, on Tuesday the *day of* (the day of the sittings,) at Westminster in the great Hall of Pleas there, commonly called Westminster Hall, in the said county of Middlesex for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the several persons mentioned in the panel annexed to the writ of *habeas corpora juratorum*: And be it known, that the justices here in this same court in this term, delivered a writ thereupon to the deputy of the sheriff of the county aforesaid, to be executed, &c.

If the trial is in London instead of Westminster Hall, say the Guildhall of the city of London aforesaid, &c.

Of making up the Record.

How nisi prius record made up when proceedings by original in B. R. or by bill in C. B.

When the suit is in B. R. by original there is no memorandum at the beginning, as when by bill (for the reason of which, see *ante*, p. 383.); so that the record in such case is similar to the common way in the court of Common Pleas; and when the suit in C. B. is by bill, as against officers, privileged persons, &c. the record is then made up like the records in the King's Bench, (when by bill,) beginning with a memorandum.

A. 2.

Of passing the record.

In B. R.

When the record is engrossed, you make an incipitur of the issue on a King's Bench roll, enter thereon the term issue is joined with warrants of attorney for plaintiff and defendant, and part of memorandum of issue; then take the record roll and the draft of the issue to the clerk of the judgments in the King's Bench office, who will enter it and mark them; to whom is paid for entering the issue, if it does not exceed ten sheets, 3s. 6d. and for every six more 1s.

If the issue should be of an old term, and entries not paid for, get number-roll of Mr. Edge, term issue is joined, make out docket for entry, and docket same with the clerk of the judgments.

The record being ready to be sealed, it must be carried to the nisi prius office, where it is examined, sealed, and passed; for which is paid 7s. 6d. for the first eight sheets, and 7s. for every eight sheets after, and 6d. to the sealer; and on a country cause, if above three weeks from the

A. 1. *Of passing the Record.**In C. B.*

When the nisi prius record is prepared, it must be carried with warrants of attorney to clerk, who will mark it, then to the protobonotaries' office, who will sign record, for which pay 1s. and 2s. a count for entering issue, or 8d. per sheet if special, and no entries paid for, the clerk will give you a roll to enter pleadings thereon to be done at a future period; then go to the clerk of the treasury at the chief justice's chambers, who will examine and see that the jurata is rightly entered, and seal the record; pay at sittings 1s. at assizes 6s.; also 2s. for first three sheets, and 4d. every other sheet, and 2s. 2d. for seal, and 2s. for a judge's warrant, if it be three weeks after term.

The clerk of the treasury by Reg. Hil. 2 & 3 Ja. 2. shall not sign or seal any record of nisi prius unless the same shall be first signed or stamped by the clerk of the warrants; and the record is not to be signed before the issue is entered. Mich. 1654.

Records

Of passing the Record.

the end of term, 2 s. for judge's warrant.

No record of *nisi prius* for trial of any issue at the assizes shall be sealed after the end of three weeks after the issuable terms. Trin. 31 Car. 2.

Records of *nisi prius* for trials at the assizes shall be signed by the respective prothonotaries, and signed and sealed by the clerk of the treasury, within three weeks after the end of the issuable terms. Trin. 29 Car. 2.

But now by a judge's order, for which you pay 2 s. the record may be sealed at any time before the assizes.

All the pleadings in the cause must be regularly entered on *nisi prius* record, the same as in issue or paper book; so that if there has been judgment of *respondens* after in a plea of abatement, and defendant pleaded over, or if proceedings on a demurrer, they must be all set forth; for which see *ante*, sect. 1, of this chapter. *Ld. Raym.* 329.

All pleadings must be entered on record.

If there are several defendants, and they sever in plea, plaintiff may, if he please, enter a *not pros* as to one defendant, at any time before the record is sent down to be tried. *Greeves v. Rolls*, Sal. 457.

If several defendants, and they sever, a *not pros* may be entered;

So if one plead bankruptcy, and the other a different plea, plaintiff may enter *not pros* as to the bankrupt, and proceed to final judgment against the other. *Noke and another v. Ingham*, 1 Wil. 89.

so if one plead bankruptcy.

If one of the defendants die after issue joined and before trial, it must be suggested on the roll by 8 and 9 W. 3. c. 11. s. 7. But if properly suggested on the plea roll, though not so accurately set forth on *nisi prius* record, it is enough. See *Far v. Denn*, Burr. 363.

If one die, it must be suggested on record.

If there be a variance between the issue book delivered in paper, and the record of *nisi prius*, it ought to be mentioned or objected to at the trial; for if the cause be tried, the court on that account will not set aside the verdict: and if the record of *nisi prius* had been wrong, the court would have amended it by the roll, after a verdict and defence made. *Leeman v. Allen*, 2 Wil. 160.

How if there be a variance between issue and *nisi prius* record.

Of passing the Record.

If the record of *nisi prius* agrees with the declaration delivered, a variation from the issue is not material. *Shepley v. Marsh*, Str. 1131. and 2 Wil. 160.

Though but a few years before it seems to have been held otherwise.

No defence was made at trial because of a variance, (in issue delivered on a promissory note, the name of the indorser was omitted, though inserted on the record of *nisi prius*.) Rule absolute to set aside the verdict. *Wreatock v. Bingham*, Bar. 476.

The *similiter* was left out in the issue delivered, though inserted in the record of *nisi prius* verdict without defence; and on a rule to set it aside for the variance, the court were of opinion, that no statute of jeofails extends to it, it is a material variance, and defendant relied on it. Rule to set it aside absolute. *Rye v. Crossman*, Bar. 476. So where it was left out in record of *nisi prius*. *Cooper v. Spencer*, Str. 641.

B.

B. Of suing out Jury Process, *Venire*, &c.

Of suing out
jury process.

Intent thereof.

Whence a jury
formerly came;

how altered by
statute.

The intent of the *venire* and jury process is to procure a jury to try the matter in issue between the parties. The writs are directed to the sheriff, commanding him to cause a jury to come at the time and place therein mentioned. Formerly, indeed, the jury were obliged to be collected from the very hundred or neighbourhood where the cause of action arose, *de vicineto*, as it is called.

But, by the statute 4 and 5 Ann. c. 16, the *venire* is to be awarded of the body of the proper county where the issue is triable in civil actions (excepting upon penal statutes); and by 24 G. 2. c. 18, it is extended to actions and informations on penal statutes also.

So that now the jury may come from any part of the county where the cause is to be tried.

When

Of suing out Jury Process, &c.

When the record is engrossed, proceed as follows :

In B. R.

The plaintiff's attorney must make out writs of venire facias and distringas, which are on a 2s. 6d. stamp each, and may be had at any law stationer's ready printed, price 2s. 8d. These writs are not to be signed. Pay sealing at seal office, 7d. each.

If the cause be tried in London or Middlesex, venire is to be tested the first return of term in which cause is to be tried, and returned some return-day before trial; the distringas must be tested on the return-day of the venire, and returnable the next return-day after trial. If at assizes, venire must be tested the first return-day preceding the assizes, and returnable the last day of that term; the distringas must be tested on the return-day of venire, and returnable the first return of the next term after the assizes.

If in London or Middlesex, the venire is taken out by plaintiff's attorney in order to be allowed him in costs, but never used or sealed. In London, carry distringas to one of the compters; pay sheriff for returning it 4s. 4d. if common; 4s. 8d. if special. In Middlesex, carry same to the sheriff's office in Took's court; pay there returning 14s. 8d. If in a country cause, venire is returned by sheriff's deputy in town, and the distringas by the under-sheriff in the country.

In C. B.

The plaintiff's attorney must make out writs of venire facias and habeas corpora, which are on a 2s. 6d. stamp each, and may be had at any law stationer's, price 2s. 8d. The venire is signed by prothonotary; pay him 1s. 4d. The habeas corpora is signed by the clerk of the habeas corporas; pay, when in London or Middlesex, 2s.; if at the assizes, 1s. 9d. No precipe is made for the office on these writs.

If cause not tried at time mentioned in habeas corpora, you make out a new writ. If you carry the old writ to the officer you save 1s. 1d. Pay sealing at seal office, 7d. each.

If cause to be tried in London or Middlesex in term, venire is to be tested the first return of term in which cause is to be tried, and returned some return-day before trial; the habeas corpora must be tested on the return-day of the venire, and returnable the next return-day after trial. If after term, teste of venire may be first day of term, and returnable last general return-day; and teste of habeas corpora on quarto die post of return-day of venire, and returnable first general return after cause tried. If at assizes, venire must be tested the first return-day of the term preceding the assizes, and returnable the last day of that term; the habeas corpora must be tested on the return-day of

How to proceed in suing out jury process in both courts.

How the writs are to be tested, &c.

Of suing out Jury Process, &c.

venire, and returnable the first return of the next term after the assizes.

If in London or Middlesex, the venire is taken out by plaintiff's attorney in order to be allowed him in costs, but never signed, sealed, or used. In London, carry habeas corpora to one of the compters; pay sheriff for returning it 4s. 6d. In Middlesex, carry same to the sheriff's office in Took's court; pay there returning 12s. If in a country cause, venire is returned by sheriff's deputy in town, and the distringas by the under-sheriff in the country.

The forms of the several writs are as follow :

In B. R.

Form of venire.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. to the sheriff of Middlesex, greeting: We command you, that you cause to come before us at Westminster, on next after (some return-day before the day of trial, if a country cause, the last day of the term,) twelve free and lawful men of the body of your county, each of whom has ten pounds by the year, of lands, tenements, or rents, at the least, by whom the truth of the matter may be the better known, and who are nowise of kin either to A. B. the plaintiff, or to C. D. the defendant, (the parties must be described as in the pleadings,) to make a certain jury of the county between the parties aforesaid,

In C. B.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. to the sheriff of Essex, greeting: We command you, that you cause to come before our justices at Westminster, on the Morrow of the Purification of the Blessed Virgin Mary, twelve free and lawful men of the body of your county, each of whom has ten pounds, of lands, tenements, or rents by the year, at least, by whom the truth of the matter may be better known, and who are in nowise of kin either to A. B. the plaintiff, or to C. D. late of, &c. or to E. F. late of, &c. (if the defendant be declared against with an alias dict. or as an executor or administrator, he must be here described, as in the pleadings,)

Of suing out Jury Process, &c.

said, of a plea of trespass to make a certain jury of the
on the case, (or whatever the count'ry between the parties
action is,) because as well the afore said, in a plea of (as
said C. D. as the said A. B. the case may be,) because as
between whom the matter in well the said C. D. and E. F.
variance is, have put them- (the party who first takes the
selves upon that jury; and have issue,) as the said A. B. be-
there then the names of the tween whom the matter in va-
jurors, and this writ. Wit- riance is, have put themselves
ness, Lloyd Lord Kenyon, at upon the jury; and have there
Westminster, day of the names of the jurors, and
(the first day of the this writ. Witness, Sir James
term,) in the 34th year of our Eyre knight, at Westminster,
reign. the 23d day of January, in the
34th year of our reign.
Mansfield & Way. (Prothonotary's name.)

If there are two sheriffs, and one is a party or in-
terested, by being related to either of the parties, or
the like, *venire* should be awarded to the other only;
or if both are interested, or there be only one sheriff,
then to the coroner of the county; and if both sheriff
and coroner are interested, then the *venire* should be
awarded to elizors, two persons chosen by the master
in K. B. or prothonotary in C. B. (upon motion in
court) for that purpose. *Holland v. Heron*, Bar. 465.

How if sheriff
be interested.

But in these cases there is a special suggestion and
award of the *venire* on the issue, so that it is only fol-
lowing the same in making up the record. *Vide*, Of the
Issue, sect. 1. of this chapter.

If it be a Welch issue, and award of *venire* into next
English county, the *jurata*, *venire*, and *distringas* are the
same as in common cases.

How if Welch
issue.

If the defendant carries down the cause by proviso,
the writ runs thus: "And have here the names of the
"jurors, and this writ;" provided always, that if two
writs shall thereupon come to you, that you only re-
turn one of them to our said court before us, if in B. R.
or to our said justices at Westminster, if in C. B. at
the time aforesaid.

How if record
carried down by
proviso.

In

Of suing out Jury Process, &c.

In B. R.

Form of distringas in B. R. and habeas corpora juratorum in C. B.

If cause at Westminster.

(a) If it is a special jury, here say, A. B. of, &c. C. D. &c. (and so on, going through the master's or prothonotary's list exactly,) merchants, jurors summoned, &c.

The form of a distringas juratores is as follows:

George the Third, &c. to the sheriff of Middlesex, greeting: We command you, that you distrain (a) the bodies of the several persons named in the panel hereunto annexed, jurors summoned in our court before us, between A. B. plaintiff, and C. D. defendant, by all their lands and chattels in your bailiwick, so that neither they, nor any one of them, do intermeddle therewith, until you shall have order command in that behalf; and that you answer to us for the issues of the same, so that you have their bodies before us at Westminster, on (the first return-day after the trial;) or before our right trusty and well-beloved Lloyd Lord Kenyon, our chief justice, assigned to hold pleas in our court before us, if he shall first come, on the day of (the day of trial) at Westminster Hall, in the county of Middlesex aforesaid, according to the form of the statute in such case made and provided, to make a certain jury between the said parties, of a plea of trespass on the case, and to hear their judgments of many defaults; and have you there the names of the jurors, and this writ, Witness, Lloyd Lord Kenyon, at Westminster, the day of (the return day of the venire,) in the 34th year of our reign.

Mansfield & Way.

In C. B.

The form of a habeas corpora juratorum is thus:

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. to the sheriff of M. greeting: We command you, that you have before our justices at Westminster, from the day of Easter in fifteen days, (the next return after the trial,) or before the right honourable Sir James Eyre, knight, our chief justice assigned to hold pleas in our court of the bench, by force of the statute in that case provided, if he shall come before, on the day of (the day of the sittings,) at Westminster Hall in your county, the bodies of several persons named in the panel annexed to this writ, jurors, summoned in our court, before our justices at Westminster, between A. B. plaintiff, and C. D. late of, &c. and E. F. late of, &c. of a plea of taking and unjustly detaining cattle, (as the case is,) to make that jury, and have there this writ. Witness, Sir James Eyre knight, at Westminster, the 12th day of February, in the 34th year of our reign.

(Prothonotary's name.)

Of suing out Jury Procefs, &c.

If in London, the *distringas* or *habeas corpora* run thus: "At the Guildhall of the city of London afore-
" said." If at the assizes thus: "Or before our jus-
" tices assigned to hold the assizes in your county, if
" they shall first come on (the commission-day,) at
" (place where assizes held) in your county, accord-
" ing," &c.

If the action is by original in B. R. you make the *venire* and *distringas* returnable *ubicunq.* or, "Where-
" soever we shall then be in England," put in the de-
fendant's addition, and leave out the word "then," at
the conclusion of the writ.

Upon the traverse of an inquisition sent out of Chan-
cery to be tried in B. R. the *venire facias* must be made
returnable on a general return-day, not on a day cer-
tain. *Rex v. Roberts*, 1 Wil. 77.

The *distringas* is amendable; the *distringas* in debt
was *de placito*, with a blank, and after verdict held
amendable, *Ld. Raym.* 1143. the *venire facias* being
right.

Motion to amend the writ of *habeas corpora juratorum*,
after the trial, returnable on Wednesday next after
eight days of the Purification, instead of Wednesday
in fifteen days of Easter; and on shewing cause, the
rule was made absolute for the amendment. *Waldo v.*
Harrison, Bar. 5.

The writ of *habeas corpora juratorum* being wrong,
in the day of *nisi prius* had been ordered to be
amended; and afterwards it was moved to amend
the *jurata* in the record of *nisi prius*. The court were
of opinion, that as the writ was amendable by the sta-
tute 5 Geo. and was amended, and the day of *nisi*
prius thereby rightly appointed, the *jurata*, which is
not an award of the court, but only to annex the pro-
ceedings, and is wrong by misprision of the clerk,
ought to be amended and made agreeable to the writ;
and the amendment was ordered. *Ib.*

The

Of suing out Jury Process, &c.

At what time
they ought to
be amended :

too late after
verdict ;

but a venire de
novo will be
awarded.

The cause was at issue, and the record of *nisi prius*, *habeas corpora*, and *jurata* were all made up for trial at a certain sitting ; but the cause not coming on to be tried at that day, the plaintiff's attorney ought to have altered the record of *nisi prius* writ and *jurata* for a future day of sitting, but neglected so to do, or to re-seal the same, although he was apprized thereof ; so the cause was tried at a future day, and it appeared, upon the face of the *jurata*, &c. that the cause was tried after the day of *nisi prius* mentioned therein, and there was a verdict for the plaintiff ; and now plaintiff moved to amend the *habeas corpora* and the *jurata*, and the defendant moved to set aside the verdict. But, on shewing cause, the whole court were clearly of opinion, that the trial was *coram non judice*, and discharged the rule for an amendment, but were of opinion, that they ought *ex officio* to order a *venire de novo* to be awarded ; which was ordered accordingly. *Crowder v. Rooke*, 2 Wil. 144.

In some cases,
though venue
not changed,
venire will be
ordered to be
awarded into
another county.

If a fair and impartial trial cannot be had in the county where *venue* is laid, court may be moved not to change the *venue*, but to award the *venire* into another county ; which is done by the party entering a suggestion on the roll, wherein should be suggested, upon the record, the facts, proving that such impartial trial could not be had otherwise. *Rex v. Harris*, Burr. 1332.

It is usual also, in such cases, to change the *venue*, See *tit. Venue*.

B.

B. 1. *Of Jury Process in Counties Palatine.*

Of jury process
in county pala-
tine.

Record sent by
mittimus.

When a cause of action arises in a county palatine, and the *venue* is laid there, the trial must be had by a jury of the palatinate ; but as the king's writ does not run there, the record is sent by a writ of *mittimus* to the justices of the county palatine, commanding them to cause a jury to be summoned to try the issue between the parties, and to return the same, when tried, to the courts at Westminster, for the parties to hear judgment thereon.

In

Of suing out Jury Process, &c.

In this case there is always a special suggestion on the issue, and special award of the *mittimus* (see Appendix N.); the *mittimus* itself, which is the only writ sued out here, is now sent (the record being passed in same manner as other records are,) and is in the following form :

Suggestion for that purpose.

George the Third, &c. to our justices of our county palatine of Chester, greeting : The tenor of a certain record before us at Westminster, between A. B. plaintiff and C. D. defendant, in a plea of trespass on the case, we send you inclosed herein, commanding that you, (having inspected the same,) by our writ of our said county, do command the sheriff of the same county, that he cause twelve free and lawful men of the body of the county, to come before you at your next session after this writ shall be delivered to you, each of whom having 10l. a year at least of lands, tenements, or rents, by whom the truth of the matter may be the better known and inquired into, and who are in nowise related either to the said A. or to the aforesaid C. to recognize and make a jury of the county between the said parties in the plea aforesaid, because as well the said A. as the said C. between whom the said controversy is, have put themselves upon that jury; and also that you make such further process against the said jurors so to be impanelled, between the said parties as are in this behalf used and commonly made, according to the law and custom of the said county, until the issue aforesaid between the said parties shall be fully tried; and when the verification and issue aforesaid shall be there made and tried before you, then do you send the record of the said plaint, together with every thing that shall then and there be done before you therein, and also this writ before us at Westminster at a certain day which you shall appoint to the said parties to be there to hear judgment thereupon. Witness Lloyd Lord Kenyon, &c. Mansfield & Way.

Form of mittimus to a county palatine.

The venire and habeas corpora are made out there.

This writ is signed with Messrs Provost and Webb, and sealed.

Signing 1s. 3d. Seal 7d.

Although all local actions arising in a county palatine must be tried there, yet such trial is subject to the same exceptions and regulations as in other counties, as if an impartial trial cannot be had, the *venire* may go to the next English county, where the King's writ run. *Vide King v. Amery, 1 D. & E. 366.*

What actions to be tried in county palatine, and to what regulations subject.

It is observable, that there is no instance, except that of the *King & Johnson*, where the court has ever sent a record by *mittimus* to be tried in a county palatine where the fact did not arise there; and Mr. Just. Buller said in the above case, he very much doubted the power of the court to do it.

How far cause of action must arise there.

It

Of suing out Jury Process, &c.

It is not quite clear when the doctrine of sending records by *mittimus* into county palatine was first taken up, but in 11 W. 3. (12 Mod. 313.) the court expressly said, that they could not order a trial in the county palatine of Lancaster, and therefore they sent the record to be tried in Yorkshire, as being the next county.

Wherever the cause of action arises in Wales, and the *venue* laid in any county there, it has been before observed, that the *venire* is awarded into the next English county. See Appendix N. & sec. 1. of this chapter.

Now as to the meaning of the expression of the next English county, it is sufficiently explained in Plow. 200. where the reason given for directing the *venue* to the sheriff of Hereford was, because the town of Cardiff was in the county of Glamorgan in Wales, *where a sheriff of this kingdom of England cannot intermeddle*. From this reason it is manifest, that it must be the next English county where the king's writ of *venire* runs. That is the only way of accounting for the Welch causes having always been tried in the next English county where the *venire* runs, and not in Chester, though, in fact, that is nearer to Wales. *Per Buller J.* in the case of *The King v. Amery*, 1 D. & E. 368.

C.

C. Of entering Cause for Trial.

Of entering
causes for trial,

If the cause is to be tried in London or Middlesex,

in London or
Middlesex;

In B. R.

It must be entered in the marshal's book at Lord Kenyon's chambers in Serjeant's Inn, Chancery-lane, pay 11 s. 8 d.; at which time the record, with the distringas and panel annexed, must be left with marshal.

In C. B.

It must be set down with the chief justice's marshal; pay 13 s. 9 d. leave the record and bab. cor. jur. with panel annexed with him.

If

Of entering Cause for Trial.

If to be tried at the sittings in term, it must be entered at sittings in term.

Two days exclusive before the day of such sitting.

Two days inclusive of the day on which it is entered before such sitting.

If to be tried at the sittings after term, it must be entered, and the record delivered to the marshal. at sittings after term.

If in Middlesex, the first day of the sitting after term.

Whether in Middlesex or London, two days at least before the adjournment-day. Hil.

If in London, two days before the adjournment-day in London. Id.

32 G. 3.

If the causes be not entered in proper time, defendant may enter a *ne recipiatur*, or marshal may refuse to receive them. Of the ne recipiatur.

A *ne recipiatur* may be entered in C. B. after eight o'clock in the evening of the second day preceding the adjournment-day. Hil. 32 G. 3.

And if it be a special jury cause, the rule for a special jury must be drawn up, and the cause marked as a special jury in the marshal's book of causes before the adjournment-day after each term. R. Trin. 30 Geo. 3.

If plaintiff be hindered from trying his cause by the defendant's entering a *recipiatur*, the plaintiff may try it at the next sitting; if in London or Middlesex, upon giving notice to the defendant or his attorney, on the day of the sitting on which it should have been tried, before the rising of the court. R. Mich. 4 Ann.

A *ne recipiatur* shall be allowed to be entered for the sittings at *nisi prius* after every term, unless the records of *nisi prius* and the writs be made up and brought into court on or before the days and sittings respectively. Hil. 8 Geo. 1. C. B.

Of entering Cause for Trial.

Every cause to be tried at *nisi prius* in London and Middlesex, shall be tried in the order in which it was entered, beginning with *remanets*; unless it shall be made out to the satisfaction of the judge in open court, that there is reasonable cause to the contrary; who, thereupon, will make out such order for the trial of the cause so put off, as to him shall seem just; notice to be given by the clerk of *nisi prius*. Mich: 17 Geo. 2. B. R. The same in C. B. Hil. 14 Geo. 2.

If to be tried at
assizes.

If the cause is to be tried at the assizes,

In B. R.

After having passed the record as before, and having got the venire returned in town with the under-sheriff, send distringas and venire into the country with the record, carry the writ and record to the judge's marshal at the judge's lodgings at assize town, and there enter them together, pay 4s. 8d.

In C. B.

Having passed the record, as in the other cases, and got venire returned, send it with the record into the country, the sheriff will return the habeas corpora juratorum in the country, take them all to judge's marshal at assize town, and have them entered.

All country causes must be entered before the sitting of the court, on the day after the commission-day, except in Norfolk and Yorkshire; in which counties they may be entered any time before the sitting of the court on the second day after the commission-day. R. H. 14 G. 2.

D.**D. Of the Cause being made a *Remanet*.**

How, if cause
made a re-
manet in town.

How, if the cause be made a *remanet* in town.

In B. R.

If the cause is not tried the day of the sitting, it is then made a *remanet* by the marshal, of course he alters the jurata, pay him

In C. B.

If the cause is not tried the day of the sitting, you must apply to the marshal to get it made a *remanet*, pay him 4s.; get your

Of the Cause being made a Remanet.

Kim 5s. get the *distringas*, alter the return to the day of the next sitting, (if it be a proper return-day,) if not, the next day; re-seal it, pay 1s. annex it to the record again, as there is no occasion for the sheriff to return a new pannel, nor is there occasion for a new stamp.

your *habeas corpora juratorum*, and alter the return to the next return-day after the next sittings, and re-seal it, pay 1d.; annex it to the record again, and get the clerk of the treasury, Mr. Jefferies, to alter the jurata to the same return as the *habeas corpora juratorum*; there is no occasion to have a new pannel returned, nor a new stamp.

How, if a *remanet* in the country.

In the country.

If the cause is made a *remanet* at assizes, application must be made to the associate for the record, to which are annexed the *venire*, *distringas*, and pannel; then make the proper alterations in the returns and day of the sittings therein; then carry the record to the *nisi prius* office to be re-sealed, and the *venire* and *distringas* to the seal office, where is paid for re-sealing each one penny; annex them together, and leave them again with the associate, to whom is paid 5s. for making it a *remanet*.

Whenever cause is a *remanet*, it is absolutely necessary to alter the *jurata*. See the case of *Crowder v. Rogers*, above cited.

It is now settled in both courts, (though formerly otherwise,) that in all cases, where a cause goes down to trial, and goes off upon any occasion without the fault, contrivance, or management of the parties, and is afterwards brought down again to trial, the costs of such former abortive going to trial, shall be taxed and allowed to the party finally prevailing, in the same manner as if the cause had gone off upon a *remanet*. *Burchall v. Bellamy*, Burr. 2693. Before it was confined to the single case of a *remanet*.

How as to costs in case of *remanet*, or the cause going off on other grounds.

And on trials by *proviso*, where plaintiff and defendant both carry down the record at the same time, the

On what record to proceed when trial by *proviso*.

Of Special Juries.

trial shall be on the plaintiff's record, if he enters it with the marshal; but if he refuses or omits to enter it, defendant may proceed on his record.

SECTION VI.

Of Special Juries.

Introduction of
special juries.

Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. 3 Blac. Com. 357.

Now to be had
in any case;
but unless judge
certifies, costs
not allowed.

And indeed before the statute of 3 Geo. 2. as appears by the preamble, it was doubted whether special juries could be had in any common cause at *nisi prius* without consent. Now, indeed, it may be had in all cases; but unless the judge at the trial be of opinion that it is a cause of sufficient importance to warrant a special jury, he will not certify, and the party will not be allowed the *extra* costs thereof, though he have a verdict.

Stat. 3 G. 2.
c. 25. as to spe-
cial juries.

By the 3 Geo. 2. c. 25, s. 15. "Whereas some doubt hath been conceived, touching the power of his Majesty's courts of law at Westminster, to appoint juries to be struck before the clerk of the crown, master of the office, prothonotaries, or other proper officer of such respective courts, for the trial of issues depending in the said courts, without the consent of the prosecutor or parties concerned in the prosecution or suit then depending, unless such issues are to be tried at the bar of the said courts; Be it declared and enacted by the authority aforesaid, that it shall and may be lawful to and for his Majesty's courts of King's Bench, Common Pleas, and Exchequer at Westminster respectively, upon motion made on behalf of his Majesty, his heirs or successors, or on motion of any prosecutor or defendant in any indictment,

Of Special Juries.

"ment, or information for any misdemeanor, or information in the nature of a *quo warranto*, depending, or to be brought or prosecuted in the said court of King's Bench, or in any information depending or to be brought or prosecuted in the said court of Exchequer, or on the motion of any plaintiff or plaintiffs, defendant or defendants, in any action, cause, or suit whatsoever depending or to be brought and carried on in the said courts of King's Bench, Common Pleas, and Exchequer, or in any of them; and the said courts are hereby respectively authorized and required, upon motion as aforesaid, in any of the cases before-mentioned, to order and appoint a jury to be struck before the proper officer of each respective court, for the trial of any issue joined in any of the said cases, and triable by a jury of twelve men, in such manner as special juries have been, and are usually struck in such courts respectively, upon trials at bar had in the said courts; which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue."

By the 24 Geo. 2. c. 18. "The person or party who shall apply for a special jury, shall not only bear and pay the fees for striking such jury, but shall also pay and discharge all the expences occasioned by the trial of the cause by such special jury; and shall not have any other or further allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the judge, before whom the cause is tried, shall, immediately after the trial, certify in open court, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

Stat. 24 Geo. 2. c. 18. As to special juries, and judge certifying.

And, by the same statute, "No person that shall serve upon a special jury, or be returned, shall be allowed, or take for such serving on any such jury, more than the judge who tries the cause shall think reasonable, not exceeding 1*l.* 1*s.* excepting causes where a view hath been directed."

Of Special Juries.

How to get
special jury.

If a special jury is required, get counsel's signature to brief indorsed, To move for special jury; it is a matter of course, pay 10s. 6d. go for rule thereon at clerk of rules in B. R. or secondary in C. B. and then get appointment from the master in B. R. or prothonotary in C. B. to nominate the forty-eight; serve copy on attorney of the other side, and also on the sheriff; pay master or prothonotary and sheriff two guineas each; then clerk will make out copies for each party, pay 2s. 6d. in B. R. 5s in C. B. When you are ready to strike, procure another appointment from the master or prothonotary; serve copy of rule again, with the second appointment on the opposite attorney; attend accordingly on master or prothonotary, who will strike out twenty-four, i. e. twelve on each side, plaintiff first objecting; and the other twenty-four will be specially named in distringas, or habeas corpora juratorum.

It is generally settled between the parties who shall sue out the distringas, or habeas corpora juratorum. It seems, however, that in C. B. the party whose special jury it is should, in strictness, sue out habeas corpora juratorum; but in B. R. the plaintiff must do it, notwithstanding it is defendant's special jury.

On a motion for a special jury, no notice of the motion or affidavit of the facts is necessary.

Of the operation
of the stat. 3
Geo. 2. and
24 Geo. 2.

It may be here observed, that the statute 3 Geo. 2. which is for the regulation of juries merely, gives the subject a liberty of having a special jury in all cases whatever, which before that statute was only granted under certain circumstances. This general licence being too often abused, the 24 Geo. 2. afterwards enacts, That no costs of such special jury shall be allowed, unless the judge certifies; but the manner in which that special jury is to be returned, and the other incidents relating to them, remain just the same as before the passing of that act: For the statute of 3 Geo. 2. which specifically directs in what way juries are to be returned, and the like, does not extend to special juries. The method, therefore, of proceeding by special juries, is in no respect altered, but must be in the same form and in the same manner as before the act. See the case of *the King v. Perry*, 5 D. & E. 463.

Motion

Of Special Juries.

Motion in C. B. for a special jury, as of course; but, before the rule was drawn up, the secondary doubting, prayed the direction of the court; and it appearing that common jury process had been awarded, issued, and returned, and that the cause stood as a *remanet* in the chief justice's paper, the court refused to grant a special jury; though, in the country causes between assizes and assizes, the practice is otherwise. Bar. 461. *Dobson v. Stevens.*

In what time special jury should be moved for.

In C. B.

So after a *venire facias* and return filed, the court held the motion for a special jury too late. *Clarke v. Sheppard*, Bar. 488.

After a common jury returned in Middlesex, and the cause made a *remanet* by consent, at the sitting after last term, defendant moved for a special jury, offering to take notice of trial for the second sitting in this term, and obtained a rule to shew cause, which was discharged. *Per Cur.* this has been done between assizes and assizes, but we cannot delay plaintiff in this case, without consent. Death or other accident may happen. Bar. 449. *Croft v. Skipwith.*

It is observable, that the above cases are in the Common Pleas, for in King's Bench the time is fixed by a late rule of court, Trinity term, 30 Geo. 3. 1790. whereby it is ordered, That no cause for the future be tried by a special jury, unless the rule for such special jury be drawn up, and the cause marked, as a special jury, in the marshal's book of causes, before the adjournment-day after each term: If either of the parties shall neglect to attend the master or prothonotary striking a special jury, the master or prothonotary, on behalf of the absent party, shall strike out twelve names. Trin. 8 W. 3. 2 Lil. Pract. Reg. 122, 123. 1 Sal. 405.

Rule in B. R.

Court was moved for directions to the master to strike out twenty-four of the special jury *ex parte*, in case the defendant and his agents should omit to attend the master's next appointment. The motion was founded on an affidavit of three appointments having been made, and their declining to strike out *till a day should be appointed*

How master may proceed *ex parte* to strike special jury.

Of Special Juries.

pointed for the trial. The special jury had been nominated in last term, but the twenty-four had not been struck out by the parties, and the cause was not then tried, but was intended to be tried at the sittings after this term. The defendant's attorney attended the master's third appointment to strike out, but declined doing it, for the reason above-mentioned. Lord Mansfield was clear the master might do it without any direction from the court, and declined giving him any in particular; but had no doubt he might do it now just as if he had proceeded last term, and that it was right for him to act as usual, unless there should appear any particular reason to the contrary. *Rex v. Hart*, Cow. 412.

Same jury may serve, though sheriff changed.

It is no reason why the same jury should not serve for the trial of a cause, which has been already struck for a former intended trial, merely because there had been a change of sheriffs in the mean time. *Ib.* Cow, 412.

So held also in C. B.

If after a special jury struck, the cause goes off for default of jurors, no new jury can be struck, but the cause must be tried by the jury first appointed.

The King v. Perry and others, Mich. 5 D. and E. 453, This was an information for a libel. A special jury had been moved for, and struck in the usual manner. The information went down to trial; on calling over the special jury, only part appeared. No tales was prayed by either party, and the cause was made a *re-manet*. In this term, Wood moved for a new special jury. On the day appointed before the master for striking it, the defendant's attorney did not attend, and it was struck *ex parte*. Erskine afterwards moved for a rule, to shew cause why Mr. Wood's motion for a new special jury should not be discharged, on the ground that defendant wished for the first special jury, and that he was entitled to have them by the cause. Bearcroft shewed cause, insisting, that it was a rule of course to strike a new special jury; the same jury was not to attend assize after assize; that there was an end of the original *venire* and *disfringas*, and a new one should now issue. But Mr. J. Buller read a MS. case of *the King v. Franklin*, which was an information for the libel called the Craftsman; when this very question was solemnly

Of granting a View.

lemnly argued, and the court determined that the same jury ought to try the cause, and that neither party could insist upon a new special jury, but that an *alias distringas* to the first jury should issue.

He also mentioned the form of the *distringas*, as a reason why it should be the same jury; for, when the twenty-four are struck out of the forty-eight, and a *distringas* issues, the *distringas* is returned, with the names of the jury specially inserted, they are put on the record; and how can they afterwards be got rid of? an *alias distringas* must therefore go, and the cause be tried by them. See the above case, where the subject is fully entered into.

An action of covenant upon a charter-party was tried at the bar in Middlesex, by a special jury of the citizens of London, who all consented to be sworn, and waived any privilege as citizens of London, in not being obliged to go out of the city to serve on juries. *Lockyer v. E. J. Company*, 2 Wil. 136.

SECTION VII.

Of granting a View.

The practice of granting a view is founded upon the statutes 4 and 5 Ann. c. 16. f. 8. and 3 Geo. 2. c. 25. Authorized by
stat. 4 & 5 Ann.
and 3 Geo. 2.

By the first of these it is enacted, " That in any
" actions brought in her Majesty's courts of record at
" Westminster, where it shall appear to the court that
" it will be proper and necessary that the jurors who
" are to try the issues in any such actions should have
" the view of the messuages, lands, or place in ques-
" tion, in order to their better understanding the evi-
" dence that will be given upon the trials of such issues
" in every such case, the respective courts, in which
" such actions shall be depending, may order special
" writs of *distringas* or *habeas corpora* to issue; by which
" the

4 & 5 Ann.
c. 16.

Special writs of
distringas and
habeas corpora
to issue for that
purpose.

Of granting a View.

“ the sheriff, or such other officer to whom the said
 “ writs shall be directed, shall be commanded to have
 “ six out of the first twelve of the jurors named in such
 “ writs, or some greater number of them, at the place
 “ in question, some convenient time before the trial,
 “ who then and there shall have the matter in question
 “ shewn to them, by the persons in the said writs
 “ named to be appointed by the court; and the said
 “ sheriff, or other officer who is to execute the said
 “ writs, shall, by a special return upon the same, cer-
 “ tify that the view hath been had, according to the
 “ command of the said writs.”

3 Geo. 2. c. 25.
 f. 14.

And by 3 Geo. 2. c. 25. f. 14. “ Where a view
 “ shall be allowed in any cause; in such case six of the
 “ jurors named in such pannel, or more, who shall be
 “ mutually consented to by the parties or their agents
 “ on both sides, or if they cannot agree, shall be named
 “ by the proper officer of the respective courts of
 “ King’s Bench, Common Pleas, Exchequer at West-
 “ minster, or the Grand Session in Wales, and the
 “ counties palatine for the causes in their respective
 “ courts; or, if need be, by a judge of the respective
 “ courts where the cause is depending, or by the judge
 “ or judges before whom the cause shall be brought on
 “ to trial respectively, shall have the view, and shall
 “ be first sworn, or such of them as appear upon the
 “ jury to try the said cause, before any drawing as
 “ aforesaid; and so many only shall be drawn, to be
 “ added to the viewers who appear, as shall, after all
 “ defaulters and challenges allowed, make up the
 “ number of twelve, to be sworn for the trial of such
 “ cause.”

The 4th of Ann. does not extend to criminal cases,
 so that in them there can be no rule for a view without
 consent.

As the above statutes are clearly and fully explained,
 and the whole doctrine of granting views settled and
 laid down in 1 Burr. 252. I shall content myself with
 reciting at length what that reporter has said upon the
 subject.

Great

Of granting a View.

Great inconvenience had arisen from the abuse of views, and their being perverted into means of delay, to the intolerable hindrance of justice. Some late instances shewed the mischief in a glaring light; and, the example being once set, there was no doubt it would be followed.

Former inconvenience from abuse of this privilege.

After the 4 and 5 Ann. c. 16. §. 8. views were granted upon motion of course; and upon this act and 3 G. 2. c. 25. §. 14. a motion prevailed, "That six of the first twelve upon the pannel must view and appear at the trial; if they did not, there could be no trial, and the cause must go off."

Views formerly granted of course, and supposed that six of the first twelve must be viewers;

Where either party wished delay or vexation, he moved for a view. A thousand accidents might prevent a view, or six of the first twelve from attending the view, or their attending the trial: he who wished them not to attend, might, by various ways, bring it about. Where a defendant in possession was well liked, and the plaintiff a stranger, or unpopular, gentlemen of themselves found excuses, especially if the view was troublesome and at a distance. Causes in several counties had, at a great expence, been repeatedly carried down and put off, either because there was no view, or because six of the first twelve did not attend the view, or did not attend the trial; though twelve viewers should appear at the trial, yet, according to the notion which prevailed, if six of the first twelve upon the pannel were not among them, the cause could not be tried.

productive of delay.

The tendency of this abuse to delay, the vexatious expence, and the obstruction of justice, was so manifest, that the court thought it their duty to consider of a remedy: and at Mich. term 1757, and at other times, Lord Mansfield informed the bar to the following effect: "That they had conferred together upon the abuse of views, and considered of a remedy in the power of the court."

How abuses remedied.

Before the 4 and 5 Ann. c. 16. §. 8. there could be no view till after the cause had been brought on to trial. If the court saw the question involved in obscurity which

How the matter stood before the statute of Ann.

Of granting a View.

which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the court, or judge at the trial, "that the nature of the question made a view not only proper but necessary;" for the judges at the assizes were not to give way to the delay and expence of a view, unless they saw that the cause could not be understood without one. However, it often happened, in fact, that, upon the desire of either party, causes were put off for want of a view, upon specious allegations from the nature of the question, "that a view was proper," without going into the proof, so as to be able to judge whether the evidence might not be understood without it.

Why that statute enacted.

This circuitry occasioned delay and expence; to prevent which, the 4 and 5 Ann. c. 16. s. 8. empowered the courts at Westminster to grant a view in the first instance previous to the trial.

As a view might be of use, and, in this shape, was attended with no delay, and but little expence, it became the practice to grant them of course upon the motion of either party.

How 3 G. 2. construed.

The 3 G. 2. c. 25. s. 14. provides, "That, where a view shall be allowed, the jurors who have had the view shall be first sworn (or such of them as shall appear,) before any drawing;" which means in apposition to such other jurors as are to be drawn by ballot; and not to establish, "that six at least of the first twelve shall be sworn."

This strict construction cause of abuse.

Real construction of 4 and 5 Ann. that it is discretionary in court to grant view.

Upon a strict construction of these two acts in practice, the abuse, which is now grown into an intolerable grievance, has arisen. Nothing can be plainer than the 4 and 5 Ann. c. 16. s. 8. The courts are not bound to grant a view of course; the act only says, "they may order it where it shall appear to them that it will be proper and necessary."

It

Of granting a View.

It is infinitely better that a cause should be tried upon a view had by any twelve, than by six of the first twelve; or by any six, or by fewer than six; or even without any view at all, than that the trial should be delayed from year to year, perhaps for ever. It can never be proper or necessary to grant a view which is asked and used for so unjust a purpose.

There have been instances of great causes put off for years; and though even nine, ten, or eleven viewers have attended, yet upon objection, "that they were not six of the first twelve," the cause has been put off, and a view moved for again, as of course, by the party who had availed himself of so glaring a chicane,

Absurdity and inconvenience of the viewers necessarily being six of the first twelve.

We are all clearly of opinion, that the act of parliament meant a view should not be granted, unless the court was satisfied that it was proper and necessary.

The abuse to which they are now perverted makes this caution our indispensable duty; and therefore, upon every motion for a view, we will hear both parties, and examine (upon all the circumstances which shall be laid before us on both sides) into the propriety and necessity of the motion; unless the party who applies will consent to and move it, upon terms which shall prevent an unfair use being made of it, to the prejudice of the other side, and the obstruction of justice,

How remedied, by the court being extremely strict in granting a view without party entering into consent rule, that trial shall not be delayed.

Lord Mansfield having made this declaration, his Lordship desired the gentlemen of the bar to think of it; and if any objections should occur, to mention them.

The expedient proposed by the court was universally approved.

The first instance happened in Hilary term 1757, in a great cause between *Pierce* and *The Earl of Faulconberg* and others; which was an issue out of Chancery often tried at Durham by special juries, and now ordered to be tried at bar by special jury from Yorkshire; (see the rule

First instance of this practice.

Of granting a View.

rule at large, together with the addition of the consent, part *infra*, pa. 453, 454.)

Another instance shewing the utility thereof.

Subsequent to this was the cause of *The Earl of Darlington v. George Bowes, Esq.*; which was an issue out of Chancery, and had been thrice carried down to be tried at Durham, (where there are assizes only once a year,) at a great expence, and every time put off by the defendant, upon objections on account of the view. Once nine viewers appeared; but they were not six of the first twelve. Another time, only four viewers appeared at the assizes. In 1757, a view was granted by mutual consent upon terms; but, by an accident (of a fall from his horse) the judge of assize was prevented from trying it. The defendant Bowes moved in Trinity term 1758 for a view, but refused to renew his former consent, or to come into any terms; insisting, that by law he was entitled to a view of course. The plaintiff had likewise moved for a view, consenting to the terms: both motions were adjourned to the last day of the same Trinity term 1758; when the court, upon all the circumstances, rejected the defendant's motion, unless he should consent (within a week) to the terms proposed;—he would not consent. The cause came on to be tried at Durham, without a view, before Mr. Baron Smythe. It happened many of the jurors had viewed upon some of the former occasions; a verdict was given for the plaintiff to the satisfaction of the judge. The defendant moved the court of Chancery for a new trial, because he had been refused a view, and because it might be fit to have another trial before his inheritance was bound: Mr. Baron Smythe certified, “that he was satisfied with “the verdict;” and also, “that a view was totally unnecessary, there being no dispute concerning the locality, discrimination, or limits of the premises, but “merely a question, To whom certain lands belonged?” The court of Chancery thought proper to grant another trial; but approved of denying a view, unless he renewed his consent, and made it part of the order for a new trial, “that he should consent to the “terms.” It was again tried before Mr. Justice Bathurst, and a verdict was found for the plaintiff to his satisfaction,

Of granting a View.

tisfaction. The defendant moved the court of Chancery for a new trial, which was refused.

Had not the court put a check to granting views from time to time as of course, a rich defendant, conscious that the merits were against him, might, from pique or humour, or litigiousness, have kept off the cause as long as he lived for want of a view, upon a question where a view could not be of the least utility.

The wisdom and fitness of what the court had done to regulate views was so fully manifested upon the occasion of this cause, and appeared to be so well justified by the authority given them by the act of parliament, and by every principle of justice and convenience, that no party has ever since moved for a view without consenting to the terms. And it is found in experience that views are now regularly had, and a competent number of viewers appeared at the trial. A view is not asked now, except in cases where it may probably be of use: and, as the non-attendance of viewers can now gratify neither party, both concur in wishing the duty performed.

This new regulation of the mode of granting views fully approved.

The rule that was made in the first instance that happened after the expedient was proposed by the court, and was received with general approbation, as is above mentioned, was drawn up in the following words:

Saturday next after fifteen days of Saint Hilary, in the 30th year of King George the 2d. *Pierce Esq. v. Earl Faulconberg* and others:

Form of rule entered into between the parties.

" By consent of counsel on both sides, it is ordered,
 " That there issue a *disfringas juratores*, to be directed
 " to the sheriff of the county of York; in which shall
 " be contained a clause, commanding the said sheriff to
 " have six or more of the first twelve of the jurors to
 " be impannelled and returned, to try the issue between
 " the parties at the place in question, before the time of
 " the trial of the said issue, to wit, upon, &c.; and
 " that B. R. on the part of the plaintiff, and T. W. on
 " the part of the defendants, shall attend on the same
 " day, and shew the matters in question to the said six
 " or

Of granting a View.

“ or more of the first twelve of the said jurors; and
 “ that the expences of taking the said view shall be
 “ equally borne by both parties, and no evidence shall
 “ be given on either side at the time of taking thereof.”

The consent as
 to terms, no
 delay shall be
 occasioned.

“ And by the like consent, it is further ordered,
 “ That in case no view shall be had, or if a view shall
 “ be had by any of the said jurors, (whether they shall
 “ happen to be any of the twelve jurors who shall be
 “ first named in the said writ or not,) yet the said trial
 “ shall proceed, and no objection shall be made on
 “ either side, either for want of a view, or that a view
 “ was not had by any of the twelve jurors first named,
 “ or for that it was not had by any particular number
 “ of the jurors named in the said writ, or for want of
 “ a proper return to the said writ.

“ On the motion of Mr. Morton, of counsel for the
 “ plaintiff; and Mr. Gould, of counsel for the defend-
 “ ants.”

The cause was tried at the bar on the 7th of May
 1757, and a full jury of viewers appeared.

This regulation
 came into com-
 mon practice;

first, as a rule
 to shew cause;

afterwards
 granted in first
 instance;

now mere mo-
 tions of course.

The above-recited rule was for a view to be had by
 a special jury, and was made absolute at once, being
 consented to by both parties: But during the remain-
 der of the same term (of Hilary 1757,) and also during
 the three following terms (of Easter, Trinity, and Mi-
 chaelmas 1757,) the court, upon proper affidavits,
 granted like rules (*mutatis mutandis*) in cases that were
 to be tried by common juries, making them only “ to
 “ shew cause,” not absolute in the first instance. The
 next term (Hilary 1758) they made some of them “ to
 “ shew cause,” others absolute in the first instance, but
 none without proper affidavits. Soon after, *viz.* in
 Trinity term 1758, they made all these rules absolute
 in the first instance; some upon affidavit, others as of
 course; since which time they are become motions of
 course, without affidavit, a counsel's mere signature
 being sufficient.

The

Of granting a View.

The form of them is as follows :

If the trial is to be by a special jury, the rule runs thus :

" It is ordered, That there issue a writ of *distringas* Form of rule, &c. in special jury causes.
juratores, &c. &c. taking thereof," (in the words of the first clause of the above-recited rule between *Pierce* and *Lord Faulconberg* and others.) The additional clause is expressed in these terms : " The plaintiff (or the defendant, *viz.* the party who prays the view) consenting, that in case no view shall be had, or if a view shall be had by any of the said jurors, whether they shall happen to be any of the twelve jurors who shall be first named in the said writ or not, yet the said trial shall proceed, and no objection shall be made on either side on account thereof, or for want of a proper return to the said writ."

The rule for a view, where the cause is to be tried by a common jury, could not continue the same since the balloting act, (3 G. 2. c. 25.) as it was before, nor could it be exactly like that for views by special juries (by reason of the particular directions given by the 14th section of the balloting act); but it used to run much like it, only *mutatis mutandis*. The present form (since that act) is this : " It is ordered, That there issue a writ of *distringas juratores*, to be directed to the sheriff of the county of Y. in which shall be contained a clause, commanding the said sheriff to have six, or some greater number of the jurors to be impannelled and returned, to try the issue between the parties, who shall be mutually consented to by the said parties, or their agents, at the place in question, before the time of the trial of the said issue, to wit, upon, &c. and that R. R. on the part of the plaintiff, and T. W. on the part of the defendant, shall attend on the same day, and shew the matters in question to the said six, or some greater number of the said jurors, who shall be mutually consented to as aforesaid; and that the expences of taking the said view shall be equally borne by both parties; and no evidence
 " shall

Of granting a View.

"shall be given on either side at the time of taking thereof."

The additional clause, now added to this rule, is in these words: "The plaintiff, or the defendant," (the party at whose instance the rule is prayed,) "consenting, that in case no view shall be had, or if a view shall be had by any of the jurors, whether they shall happen to be six or any particular number of the jurors, who shall be so mutually consented to as aforesaid, yet the trial shall proceed, and no objection shall be made on either side on account thereof, or for want of a proper return to the said writ." 1 Burr. 253, to 258.

In C. B.
Same practice,
only habeas cor-
pora juratorum
instead of di-
stringas.
Mode of obtain-
ing a view in
term.

In the Common Pleas the method is the same, except that, instead of the *disstringas juratores* for a view, their process is the *habeas corpora juratorum*.

As to the mode of obtaining the rule, give brief to counsel with 10s. 6d. his signature is enough. Apply to the attorney on the other side for the name and place of abode, &c. of his shewer. Carry brief, with sufficient instructions as to time and place of meeting, &c. to clerk of rules, who will prepare rule. Serve copy on the attorney of the other side. Carry the original rule to sheriff's office; and, if it be a special jury, leave the names of jury at the same time; if a common jury, there is no occasion, as he knows them by the pannel: He will summon the jury agreeable to the rule.

In vacation.

In vacation this is done by a judge's order, counsel having signed brief, as before.

Of the conduct
of the shewers
who attend the
viewers on the
view.

After the merits of the cause had been determined at the assizes by a special jury, after a trial of twenty hours, defendant moved to set aside the verdict, upon affidavit that plaintiff's shewer, at a view pursuant to a rule of court previous to the trial, had misbehaved himself, by telling the viewers, 'This place is called Abraham's Yat, and this Conygree-hill, (which were not the places in question;) and saying, These cottages pay Mr. Symons 5d. or 6d. a-year rent; defendant insisting, that nothing more than the place in question, which was one single cottage, should have been shewn

Of granting a View.

to the viewers. Upon hearing counsel on both sides, the court discharged the rule; being of opinion, that on a view the shewers may shew marks, boundaries, &c. to enlighten the viewers; and may say to them, These are the places which on the trial we shall adapt our evidence to. The jury could have no light from looking at the cottage only. The question to be tried was, Whether it stood within Mr. Symons' manor, or not. Had an ancient man been produced to the viewers, and he had acquainted them that he had known the place many years, and given an account of the boundary, &c. this would have been improper, because it is giving evidence before the trial. *Goodtitle on Demise of Symons v. Clark*, Bar. 457.

SECTION VIII.

Of examining Witnesses on Interrogatories.

It is sometimes necessary to apply to the court for leave to examine witnesses on interrogatories; as if they are about to leave the kingdom before the trial, and not likely to return in time, or the like; in which case, party would be deprived of the benefit of their testimony.

When necessary to examine witnesses on interrogatories.

This application to the court is founded upon an affidavit, that such person is a material witness, without whose testimony you cannot proceed to trial, and that he is on such a day going to the East Indies (or the like); it is a rule to shew cause, which afterwards must be made absolute, in the usual way.

Ground of application.

How leave obtained in term;

If in vacation, it is done by judge's order.

in vacation.

As this is not strictly consistent with the rules of legal evidence, it is a matter *ex gratia*, and can only be done with the consent of the other party.

Other side must consent;

H h

If,

Of examining Witnesses on Interrogatories.

if not, how
court will re-
lieve.

If, however, the request is reasonable and equitable, and justice is not likely to be administered without it, though the courts of law cannot immediately compel the other side to consent, yet they will prevent them from gaining any advantage by such obstinacy, and assist the party applying, by putting off the trial from time to time, until such consent be gained, or the material witness returns, or a bill in equity may be filed, or the like. *Fairly v. Newnham*, Do. 420.

This mode of
examination
allowed where
witnesses live
out of the reach
of process;

Upon the same principle, if witnesses live out of the reach of the process of the courts, and cannot be compelled to attend, upon application of the court to have them examined before commissioners, specially appointed and approved of by the opposite party, and that such depositions should be read at the trial, if the other side will not consent, court will put off the trial for ever. *Moslyn v. Fabrigas*, Cow. 174.

by writ of
dedimus.

In such examinations, a writ of *dedimus potestatem* issues, which is annexed to the interrogatories, and the commissioners certify the answers under their seals.

But if the at-
tendance of
witnesses can
be procured,

But if the party can procure the attendance of such witness at the trial, his depositions must not be read. *How v. Acloni*, 12 Mod. 493.

depositions
must not be
read.

As if a witness going to sea be examined by interrogatories before a judge, and the trial comes on before he is gone, his deposition shall not be read, but he must appear; for the rule, in such case, is made on a supposal of his absence. Sal. 691. Anon.

How to pro-
ceed when rule
obtained.

When the rule is made absolute, a copy thereof must be served on the attorney of the other side, together with a notice of the time and place such witness is to be examined, and also a copy of the interrogatories to be administered to him. The other side may then also draw up interrogatories, by way of cross examination of such witness, and send them to the judge's chambers. The witness, at the time appointed, is taken to the judge's chambers, and is examined by the judge's clerk, and sworn upon the interrogatories on both sides, after which the clerk makes out copies of the depositions. The interrogatories must be signed by counsel, see

1 l. 1 s.

Of examining Witnesses on Interrogatories.

11. 1s. and engrossed on a twelve penny stamp parchment. The depositions are afterwards produced, and read at the trial.

The form of interrogatories for the examination of a witness.

Interrogatories for } Interrogatories to be administered to E. F. Form of inter-
the plaintiff. } a witness to be produced, sworn, and ex- rogatories for
mined on the part and behalf of A. B. plaintiff, in a certain plaintiff;
cause, now depending in the court of our lord the King, before
the king himself, against C. D. defendant therein, before Sir
Francis Buller baronet, one of his Majesty's justices of the court
of King's Bench, pursuant to a rule of the said court made, on
next, after in the 34th year of the reign of
King George the Third: (Or, if an order, say, pursuant to an
order of the said Francis Buller, made the day of)

Imprimis, Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either of them, and which of them, and how long have you known them, either, or which of them? Declare.

Secondly, Do you, &c. (and so on, putting the questions necessary for his evidence.)

Lastly, Do you know of any other matter or thing, or can you say any thing touching the matter in question in this cause, that may tend to the benefit and advantage of the complainant in this cause, besides what you have been interrogated thereto? Declare the same fully and at large, as if you had been particularly interrogated thereto.

Interrogatories for } Interrogatories to be administered, &c. for defendant;
the defendant. } (as before.)

Great nicety is required in drawing interrogatories; and particular care must be taken, that the questions are not too leading.

Form of interrogatories for the cross examination of the same witness.

Interrogatories to be administered to and examined on the part for cross exa-
and behalf of A. B. plaintiff, in a certain cause now depending mination of
in, &c. as before, against C. D. defendant therein, by way of witnesses.
cross examination to certain interrogatories to be administered

Il h a

to

Of examining Witnesses on Interrogatories.

to the said E. F. on behalf of the said plaintiff, before Sir Francis Buller, &c. as before, pursuant to a certain rule, &c. as before.

SECTION IX.

Of compelling Witnesses to appear at the Trial.

A. Of the Procefs for that Purpose, and its Incidents.

B. Of the Expences of Witnesses, and how paid.

C. Of the Remedy against them in case of Disobedience.

3.
Of the procefs
to compel ap-
pearance of
witnesses.

As it is incumbent upon the parties in the suit to prove by evidence the matter in issue between them, and as the witnesses, who alone can prove the material facts, may be either inimical, or at least indifferent to the cause, or unwilling to attend, it is obviously necessary for the administration of justice, and the investigation of truth, that there should be some compulsory procefs to bring in such unwilling witnesses under the terrors of punishment, in case of disobedience.

By subpœna.

This procefs, in both courts, is by writ of *subpœna ad testificandum*; the form whereof being somewhat different in the two courts, is as follows:

In B. R.

George the Third, &c. to A. B. C. D. E. F. and G. H. greeting: *We command you, that, all and singular businesses and excuses being laid aside, you, and every of you, be and appear in your proper persons before our justices assigned to hold the assizes in and for the county of Surrey, according to the form of the statute, &c. on Wed-*

In. C. B.

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. to A. B. C. D. E. F. and G. H. greeting: *We command and firmly enjoin you, and each of you, that, laying all other matters aside, and notwithstanding any excuse, you be in your proper persons before our justices at the*

Form of sub-
pœna for
assizes.
Four witnesses
may be put in
one subpœna.

Of compelling Witnesses to appear at the Trial,

Wednesday, the fifth day of July next, (the day of the assizes,) by nine of the clock of the forenoon of that day, at Guildford in the said county, then and there to testify all and singular those things which you and either of you know, in a certain action now in our court before us depending, between J. B. plaintiff, and T. I. defendant, (if by original, add his addition,) of a plea of trespass on the case, (or whatever the action is,) on the part of the plaintiff (or defendant, if his witnesses,) at the aforesaid day, to be tried by a jury of the county; and this you, nor any of you, are in nowise to omit, under the penalty of each of you of 100l. Witness, &c.

Mansfield & Way.

If at the sittings in Westminster, say, before our right trusty and well-beloved Lloyd Lord Kenyon, our chief justice, assigned to hold pleas in our court before us, on Monday, the 24th of June next, (the day of the sitting,) by nine of the clock in the forenoon of that day, at Westminster Hall, in the county of Middlesex, (or if in London, say, at the Guildhall of the city of London.) Blankwrits may be bought at the Stationer's.

You pay for signing the subpoena 1s. 8d. sealing 7d. and then you take out a subpoena-ticket for each witness to the following purport, and serve each witness with a copy; pay him 1s.

the assizes, to be held at in the county of on the first day of August (the first day of the assizes) next ensuing, to certify and speak the truth in a certain matter of controversy pending undetermined in our court, before our justices at Westminster, between J. B. plaintiff, and T. I. late of E. in the said county of gentleman, defendant, in a plea of trespass, (as the action is,) and this you are not to omit, nor is any one of you to omit, under the penalty of each of you of 100l. Witness, Sir James Eyre knight, at Westminster, the day of in the 34th year of our reign.

Prothonotary.

If the trial be to be had in London, you say, before Sir James Eyre, our chief justice of the court of King's Bench, at Guildhall, London, on (the day of the sittings,) to testify, &c.

Teste it the last day of term.

For trial at Westminster and London.

If in Middlesex, thus: Before Sir James Eyre knight, our chief justice of the Bench at Westminster, in the great hall of pleas there, called Westminster Hall, to testify, &c.

When the subpoena is filled up, the duty whereof is 2s. carry it to the proper prothonotary to be signed, for which you pay 1s. and to the seal office to be sealed, for which you pay 7d. and then you make out tickets for each of the witnesses, in the following form: Serve each witness with a copy.

How subpoena filled up, &c.

Subpoena-ticket how to be served.

To

H h 3

Mr.

*Of compelling Witnesses to appear at the Trial.*Form of ticket. *To Mr.*

By virtue of a writ of subpœna to you directed, and herewith shewn unto you, you are commanded personally to be and appear before Lloyd Lord Kenyon, chief justice of his Majesty's court of King's Bench, on Monday the fifteenth day of July instant, by eight of the clock of the forenoon of the same day, at Westminster Hall in the county of Middlesex, to testify the truth, according to your knowledge, in a certain cause now depending, and there to be tried, between I. B. Esq. plaintiff, and T. I. defendant, in a plea of trespass on the case on the part of the defendant; and hereof you are not to fail, upon pain of one hundred pounds. Dated the 10th of July in the thirty-fourth year of the reign of our sovereign lord George the Third, king of Great Britain, &c. in the year of our Lord 1794.

*By the Court.**T. S. attorney for defendant.**Mr.*

By virtue of a writ of subpœna to you directed, and herewith shewn unto you, you are commanded personally to be and appear before his Majesty's justices of assize (or the chief justice, as before directed, according as the case is,) on the day of by of the clock in the forenoon of the same day, to testify the truth, according to your knowledge, in a certain cause now depending, and there to be tried, between A. B. plaintiff and C. D. late of in the county of gentleman, defendant, in a plea of trespass (as the action is) on the part of the plaintiff, (or the defendant, if at his instance subpœnaed;) and hereof you are not to fail, upon pain of one hundred pounds. Dated the day of in the year of our Lord 1794, and in the year of the reign of our sovereign lord George the Third, king of Great Britain, &c.

J. R. Attorney.

Of subpœna duces tecum.

If any person has in his possession any writings, deeds, books of accounts, or other things which it may be necessary to produce on the trial of the cause, or on the execution of the inquiry, he should be served with a subpœna duces tecum, commanding him to bring with him, and produce the same at the trial of the cause, or execution of the inquiry: which subpœna is like the former, only you insert a clause, after mentioning the place of trial or inquiry, to the following effect:

Form thereof.

" And also that you bring with you and produce at the time and place aforesaid, a certain deed or instrument in writing, bearing date, &c. (describe the thing to be produced,) then and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning

Of compelling Witnesses to appear at the Trial.

concerning a certain action now in our court, before us depending,
&c. It is signed and sealed as before.

But an attorney is not obliged to obey a subpoena with a *duces tecum* of papers belonging to his client, served upon him to found a prosecution by indictment against his client for forging them. *Rex v. Dixon, Burr. 1637.* How far obligatory.

But if the requisite papers, letters, &c. are in possession of the plaintiff or defendant, or the respective attorneys in the cause, a common written notice to produce them will be sufficient. When a notice only to produce papers, &c. will do.

If the witness be in custody, he must be brought up by *habeas corpus ad testificandum*. How witness in custody to be brought up.

Make an affidavit,

That *A. B.* now a prisoner for debt, in custody of *is, and will be, a material witness for this deponent in the trial of this cause. And this deponent further saith, that he is advised, and verily believes, that he cannot safely proceed to the trial thereof, without the testimony of the said A. B.* Affidavit to obtain habeas corpus.

Swear affidavit before a judge, who will grant his fiat for habeas corpus. In gross writ of habeas corpus on 5s. stamp parchment, get judge's name indorsed thereon: It must be signed and sealed as subpoena; then leave it at marshal's or gaoler's, in whose custody witness is; and, at same time, tender his reasonable charges for bringing him up, otherwise he is not bound so to do.

The *habeas corpus* cannot be obtained either by motion in court, or before a judge, without an affidavit made by the party applying, that the witness is a material one. *The King v. Laver, Fort. 396. Rex v. Burdage, Burr. 1440.* Necessity thereof.

And it must be signed by a judge, or it is nugatory. *Rex v. Roddam, Cow. 672.* Habeas corpus how signed.

The court will not grant a *habeas corpus ad testificandum* to bring up a prisoner of war, it must be done by an order from the secretary of state; or he may be examined Who may or who may not be brought up by habeas corpus;

Of compelling Witnesses to appear at the Trial.

prisoners of war; examined on interrogatories. *Furly v. Newnham*, Do. 420.

sailors;

Sailors on board a ship cannot be brought up by *habeas corpus* against their consent as prisoners; but on affidavit that they have been served with subpoenas, and are willing to attend, judge will grant an *habeas corpus* to the commander of the ship to bring them up. *Rex v. Roddam*, Cow. 672.

prisoners in execution.

It was formerly held, that a prisoner in execution could not be brought up to give evidence by *habeas corpus*, as it would operate as an escape in the warden or marshal. Comb. 17. 48. *Burdus v. Shorter*, Bar. 222.

But in the *King v. Burbage*, Burr. 1440. on such a motion it is said that lord Mansfield agreed, that in general a *habeas corpus ad testificandum* will lie to remove a person in execution to be a witness; but refused that application, thinking it, under the circumstances of the case, a mere contrivance.

Reasonable time must be allowed witnesses for their attendance.

Witnesses ought to have a reasonable time to put their own affairs in such order, that their attendance upon the court may be of as little prejudice to themselves as possible: and the court of B. R. held, that notice at two in the afternoon in the city to attend the sittings that evening at Westminster, was too short a time. *Hammond v. Stewart*, Str. 510.

But if in court. he may be then served with subpoena.

But if the witness happens to be in court at the trial, a subpoena ticket then served upon him is sufficient. Cow. 845.

And this, although he is defendant's attorney, and his evidence is against his client.

Even though defendant's attorney

If the defendant's attorney, who is a subscribing witness to an agreement upon which the plaintiff brings his ejectment, refuse to give evidence of his attestation, &c. upon service of a subpoena upon him in court for that purpose, the court, out of which the record issues, will

Of compelling Witnesses to appear at the Trial.
will grant an attachment against him. *Doe on dem.*
Jupp v. Andrews, Cow. 845.

Service of a subpoena should be personal service, otherwise the court will not grant an attachment, though perhaps an action might lie. *Smalt v. Whitmill*, Str. 1054. Subpoena must be personally served.

B. Of the Expences of Witnesses, and how paid.

B.

No witness is obliged to attend, unless his reasonable expences are tendered him by the party wanting his testimony. Expences must be tendered.

The quantum of these expences must be governed by the circumstances of the case. Quantum thereof;

Two guineas for a witness to come from Chester to Guildhall held not sufficient. *Chapman v. Pointon*, Str. 1150.

There should be enough tendered to cover the whole expences of the journey, and of the necessary stay at the place of trial. *Fuller v. Prentice*, 1 C. B. T. R. 49. must be sufficient.

The tender of expences must be made when the subpoena is served. *Ib.* When tender must be made.

For even if without such tender being made, the witness attends at the trial, and his expences are there tendered, it is not good; but he may refuse to give testimony. *Bowles v. Johnson*, Blac. 36. Consequence of neglecting it.

For a person not properly subpoenaed, is to be looked upon only as a stander-by; and it is no contempt of the court for a stander-by to be refused to be examined. —*Ibid.*

When a subpoena is served on a witness in London, a shilling is usually given; but if he is at any distance, and must reasonably incur expence to attend the trial, it should be tendered him.

For

Of compelling Witnesses to appear at the Trial.

For in no case is a witness obliged to trust to the court allowing him more when he comes to be sworn; perhaps the party may not call him, and then it may be difficult for him to get home again. Str. 1150.

Contingent
losses not al-
lowed in costs.

Any contingent losses which witnesses may suffer by obeying the subpoena, cannot be allowed on the taxation of costs. *Theelluffon v. Staples*, Do. 438.

C. **C.** Of the Remedy against Witnesses in case of Disobedience.

Two modes, by
attachment and
by action;

If the witness be properly served with the subpoena, and his expences tendered, and he refuses to appear and give evidence on the trial, there are two remedies at the election of the party; the one a criminal proceeding by attachment, the other a civil proceeding by action.

by attachment;

The remedy by attachment is a modern proceeding, the C. J. in 22 G. 2. said he remembered the first motion for them: and it was a long time after the court of King's Bench had adopted this mode, that the court of Common Pleas would accede to it. *Huffe v. Towke*, Bar. 33. *Chapman v. Pointon*, Str. 1150.

But in 25 G. 2. *Friend v. Hope*, Bar. 36. a rule to shew cause why an attachment should not issue, was granted in C. B. and would have been made absolute had not the subpoena been irregularly served; and now both courts give this remedy by attachment, but proceed therein with great caution, expecting to be well satisfied of the subpoena having been properly served, and expences tendered, and the like. *Fuller v. Prentice*, 1 C. B. T. R. 49. *Bowles v. Johnson*, B. R. Blac. 36.

An attachment was granted against a bailiff for refusing to make an affidavit of the service of a subpoena upon a witness; which affidavit was necessary in order to found a motion for an attachment against him for his non-

Of compelling Witnesses to appear at the Trial.

non-appearance; for a bailiff is in a very different situation from another man, being an officer of the court. *The King v. Rudge*, Blac. 432.

As to the civil proceeding by action, it may either be by action. an action upon the case for damages, or the party may resort to his remedy under the stat. 5 Eliz. c. 9. s. 12. which gives a penalty of 10*l.*; and also su h further recompence to the party grieved, as the judge of the court out of which the process issued shall award. This further recompence, therefore, must be assessed by the court; and upon that assessment an action of debt may be brought. So an action of debt may be brought for the 10*l.* penalty. *Pearson v. Hes*, Do. 556.

C H A P. X.

Of Trial and its Incidents.

SEC. 1. *Of Trials at Bar.*SEC. 2. *Of preparing Briefs, and attending Trials.*SEC. 3. *Of challenging the Jury and of Talesmen.*SEC. 4. *Of nonsuiting at the Trial.*SEC. 5. *Of References at the Trial,*SEC. 6. *Of Demurrers to Evidence, and of Bills of Exception.*SEC. 7. *Of Verdicts and Cases reserved.*SEC. 8. *Of Judge's Certificates for Costs.*

SECTION I.

Of Trials at Bar.

Formerly the usual mode of trial.

FORMERLY all trials were had at *the bar* of the court in actions which were first commenced there; but this seldom happened, except in matters of consequence, as trifling suits were brought and determined in the court baron, hundred, or county court.

How fell into disuse;

But when it became the usage to bring actions of any trivial nature in the courts of Westminster, it was found to be an intolerable burthen to compel the parties' witnesses and jurors to come from the distant parts of the kingdom to try such suits. A practice, therefore, very early obtained of *continuing* the cause from term to term in the court above, provided the justices in eyre did not previously come into the county where the cause of action arose; and if it happened that they arrived there within that interval, then the cause was removed from the jurisdiction of the justices at Westminster to that of the justices in eyre; afterwards the justices in eyre were superseded by the justices of assize, to whom, by

by continuing cause till justices of eyre come into the county.

Justices of eyre superseded by justices of assize.

Of Trials at Bar.

by statute of 13 Edw. 1. a power was given to try all common causes; and now, by virtue of the commission of *nisi prius*, as it is called, all common causes are tried at the assizes in the country, and at the sittings at London and Westminster. For an explanation of which, see Appendix O.

Appendix O.

Thus trials at bar fell into disuse, except in cases of difficulty and importance, and the terms were appropriated to legal arguments, and the multiplicity of business brought forward in the courts by motion.

Trials at bar only continued in cases of difficulty.

A trial at bar (which is a trial in term time before all the judges of the court) can only now be obtained by motion in court, and affidavit of the nature and intricacy of the cause: if obtained, it must be by special jury. The day of trial is appointed by the court; the cause is set down with the clerk of the papers in B. R. or secondary in C. B. and the record delivered to them.

Trial at bar what, and how obtained.

The granting of a trial at bar is entirely in the discretion of the court; and such a trial ought not to be granted without good reason, because it is very expensive to the parties, and the business of the other suitors is thereby delayed. Neither the length of a cause nor the value of the matter in question is a sufficient ground for granting a trial at bar; and in order to obtain one upon the account of difficulty, it is not sufficient to say generally in an affidavit, that the cause is expected to be difficult; but the particular difficulty which is expected to arise ought to be pointed out, that the court may judge whether it be sufficient for the granting of a trial at bar. *Rex v. Burgeses of Carmarthen*, Say. 79.

In discretion of court to grant it;

what sufficient ground for it;

when moved for by affidavit;

All questions concerning trials at bar must depend on their own circumstances; and the general rule to go by is the judgment which the court shall form on the nature of the issues and their dependencies. *The King v. Amery*, 1 D. & E. 366.

But if a judge of the court or master in chancery be a party to the suit, there shall be a trial at bar upon motion,

when no affidavit necessary;

Of Trials at Bar.

motion, without any affidavit. *Morton v. Hopkins*,
1 Sid. 407.

terms imposed
on granting it; As a trial at bar is a matter of favour, the court may
impose what terms they please on the party applying;
as that he shall receive only *nisi prius* costs and pay bar
costs, or the like. *Holmes v. Browne*, Do. 426.

whether allowed
in an issuable
term; A trial at bar is not allowed by the court to be in an
issuable term, unless the crown is actually concerned in
the interest. And. 271. 237. N. on R. Mic. 4 Ann.
Corporation of London v. Lynn, 1 C. B. T. R. 206.
Dunn v. Lord Cadogan & Others, Burr. 273.

or if venue be in
London; A cause cannot be tried at bar where the action
is laid in London, by reason of their charter, 2 Sal. 644.;
because the granting a trial at bar when the venue is laid
in London, would be contrary to a charter by which the
citizens are exempted from serving as jurors out of this
city. Str. 356.

Unless the citizens waive their privilege, and consent
to be sworn as jurymen; in which case such trial may
be had. *Locker v. E. I. Company*, 2 Wil. 136.

or if in county
palatine; Q. Whether an action depending in a court of a
countypalatine can be tried at bar; and whether the court
of B. R. can compel the inhabitants of the county pala-
tine to attend as jurors on such trial? *Gally v. Clegg*,
Say. 47. *The King v. Amery*, 1 D. & E. 366.

not granted the
same term it is
moved for; Nor will it be granted the same term it is moved for.
Cooke's Rep. 66. It must be moved one term to be
tried the next.

nor till issue
joined. The court will not grant a trial at bar till issue is joined;
because it would be *infra dignitatem* to grant it till they
knew whether the issue joined would be a matter of dif-
ficulty or not. Case of the Borough of Christ Church,
Str. 696.

except in eject-
ment. But an ejectment cause is an exception to this rule;
in which, as issue is seldom joined till the term is over,
it

Of Trials at Bar.

it would, in general, be too late to apply for such trial after it is joined. Anon. Say. 155.

Trial at bar must be moved for in court, and the day is always appointed by the court; but yet the plaintiff is at liberty to countermand the notice of trial, and to prevent the cause being tried on that day; which if he does, it cannot be again brought to trial, unless some day be appointed by the court.

Trial at bar must be moved for in court.

Of countermanding notice.

A second rule cannot be made for a trial at bar between the same parties in the same term; nor can it be in an issuable term. *Cantillon v. Lord Montgomery*, Fitzgib. 267.

Of obtaining a second rule.

A trial at bar was put off because the jury were not summoned in proper time. Six days notice, *per Foster*, ought, at least, to be given. *Rex v. Owen*, Say. 30.

How many days notice of trial necessary.

The plaintiff's attorney must, before the effoin day of the term in which the cause is appointed to be tried, give notice to the chief prothonotary, or his secondary, of the day on which the cause is to be tried, that the same may be put down in the court book; and in case of neglect, and without motion and special direction of the court, such cause shall not be tried that term. Hil. 6 Ann. in C. B.

How to be entered for trial.

On trials at bar, the lord chief justice, and other judges, are to have copies of the issues in such causes delivered to them four days before the time appointed for trial. Mich. 3 Geo. 2.

Of delivering copies of issue to the judges.

Of late years, new trials have been granted after trials at bar as well as after trials at *nisi prius*. *Bright v. Eynon*, Burr. 395.

New trial after trial at bar.

On a day appointed for a trial at bar, only nine of the jury appeared; plaintiff prayed for a *decem tales*: by the course of the court, the trial could not have come on again until Michaelmas term; this being Easter term, and the next an issuable term, wherein no trials at bar are allowed. As this would have been a great expence

How if the jury do not attend at the trial.

Of the decem tales, &c.

and

Of Trials at Bar.

and delay to the parties, the court ordered a *decem tales*, and although this was on the Saturday, they ordered it to be returnable on the Monday following, (though there had never been before an instance of it.) *Denn v. Cadagon*, Burr. 273.

N. B. At common law, where a sufficient number of jurymen did not appear, a writ of *decem tales*, or *eo tales*, and the like, was issued to the sheriff, which was for a supply of *such* men as were wanting; and this must still be done at a trial at bar, if the jurors make default. But at the assizes, or *nisi prius*, by stat. 35 Hen. 8. c. 6. and other subsequent statutes, the judge is impowered, at the prayer of either party, to award a *tales de circumstantibus* of persons present in court. 3 Blac. Com. 364.

SECTION II.

Of preparing Briefs, and attending at Trial.

Having taken every preparatory step for the bringing of the cause to trial, nothing remains but to deliver briefs to counsel, and attend at the time appointed.

Of the brief.

The brief should contain an abstract of the pleadings, a clear statement of the client's case, and a proper arrangement of the proofs, with the names of the witnesses.

The grand rule to be observed in the drawing of briefs is conciseness with perspicuity.

Of the attendance of the parties.

When the cause is in the paper for trial it is the duty of the plaintiff and defendant's attorney to attend the court, to see how the causes go off; to take care that their counsel and witnesses have early notice when the cause is coming on, that they may be ready to perform their respective duties.

If

Of preparing Briefs, and attending at Trial.

If the plaintiff's attorney is absent when cause is called on, the cause may be struck out of the paper, by order of the court, and he, or his client, be subjected to pay the costs of the day, for not trying cause according to notice, or he may be nonsuited.

How, if attorney absent.

If defendant's attorney is absent, his client will lose the benefit of his case in defence, and be subject to costs.

The court will scarcely admit an excuse for the absence of plaintiff's or defendant's attorney, when their duty requires them to be present. They are allowed in their bill for their attendance while cause is in the paper, and till tried, and it is expected and imagined by court that they do attend.

No excuse for non-attendance.

SECTION III.

Of challenging the Jury, and of Tales Men.

When the cause is called on in court, the record is then handed to the judge to peruse, and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called on and sworn; at this time, therefore, it is necessary to attend to the names of the jury as they are called over, and before they are sworn, or to object to the former jury being sworn, which is generally done in common causes, if there be any person upon the jury that is exceptionable.

Of challenging the jury.

For either party has a right, upon good cause shewn, to challenge the jury, as it is called.

Either party may challenge.

Now challenges are of two sorts, either to the array or to the polls.

Two sorts of challenges.

Challenges to the array are, when an exception is made to the whole pannel in which the jury are arrayed or set in order, by the sheriff in his return to the jury

Challenge to the array, what.

Of challenging the Jury, and of Tales Men.

Grounds there-
of.

process, and they may be made upon account of partiality, or some default in the sheriff or under-sheriff: As if the under-sheriff is attorney in the cause, and returns the jury, it is good cause of challenge to the array. *Baylis v. Lucas*, Cow. 112. Or if the sheriff be party to the suit, or interested therein, or the like. Also, though there be no personal objection against the sheriff, yet if he arrays the pannel at the nomination, or under the direction of either party, this is good cause of challenge to the array. But challenges to the array seldom happen; because, 1st, The same reasons, generally speaking, that are sufficient to quash the array, would be good grounds at the time of awarding the venire to direct it to the coroners or elisors, as before-mentioned, page 433. upon a proper suggestion being made on the record, as in Appendix, N. And 2dly, Because such reasons as would quash the array, would also be good grounds for a motion for a new trial. Cow. 112.

Challenge to the
poll, what.

Grounds there-
of.

1st, Propter
honoris respectum.

2d, Propter
defectum.

3d, Propter
delictum.

Challenges to the polls (in capita) are exceptions to particular jurors. The grounds of such challenges are reduced, by Lord Coke, to four. 1st, *Propter honoris respectum*: As if a lord of parliament be impannelled on a jury, he may be challenged by either party, or may challenge himself. 2d, *Propter defectum*: As if a jurymen be an alien born, or a slave, or bondman, or a minor, or, which is the principal deficiency, has not a sufficient estate * to qualify him to be a juror. 3d, *Propter delictum*: As if he has been guilty of any crime or misdemeanor that affects his credit and ren-

* By 4 and 5 W. and M. c. 24. s. 15. all jurors (except strangers upon trials per medietatem linguæ) who are to be returned for trials of issues in any of the superior courts, or general quarter sessions, must have in their own name, or in trust for them within the same county, 10l. by the year at least, above re-prizes of freehold or copyhold lands or tenements, or of ancient demesne, or in rents, or in all or any of them, in fee-simple, fee-tail, or for the life of themselves or some other person; and in Wales 6l.

But tales men only 5l. Sec. 18.

By 3 Geo. 2. c. 16. qualification extended to persons having estates in possession, in land in their own right, of the yearly value of 20l. and upwards, above the reserved rent, the same being held by lease for five hundred years, or for ninety-nine years, determinable on lives.

ders

Of challenging the Jury, and of Tales Men.

ders him infamous; as for a conviction of treason, felony, perjury, or conspiracy; or if he hath received judgment of pillory, or been branded or whipped; or if he be outlawed or excommunicated. 4th, *Propter affectum*; which, as it is the most general cause of challenge, I mention it last. This may be either a principal challenge, or to the favour. A principal challenge is such, where the cause assigned carries with it *prima facie*, evident marks of suspicion, either of malice or favour: As that a juror is of kin to either party; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: All these are principal causes of challenge, which, if true, cannot be over-ruled; for jurors must be *omni exceptione majores*. Challenges to the favour, are where the party hath no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance, and the like, the validity of which must be left to the determination of triors, whose office it is to decide whether the juror be favourable or unfavourable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and, if they try one man and find him indifferent, he shall be sworn, and then he and the two others shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest.

4th, *Propter affectum*.

Principal challenge.

Challenge to the favour.

A juror may himself be examined on oath of *voir dire* *veritatem dicere*, with regard to such causes of challenge as are not to his dishonour or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. 3 Blac. Com. 363, 364. See also Burr. 1856.

Of examining a challenged juror on the voir dire.

But this practice, of assigning particular reasons for challenges, and of the same being canvassed by triors, as above-mentioned, is become in a great measure obsolete,

How this practice now dis- used.

Of challenging the Jury, and of Tales Men.

since 3 G. 2.
c. 25.

solete, since the stat. 3 Geo. 2. c. 25. which directs the mode of returning jurors in all common causes; for as, by the provision of that statute, there are generally a sufficient number of jurymen attending, the clerk at *nisi prius* or associate will, upon an intimation from either party, refrain from calling any person objected to without any reason being assigned.

Of the tales de
circumstanti-
bus.

If, however, by means of challenges or excuses, or non-attendance of the jurors, a sufficient number should not appear at the trial, either party may pray a *tales*; which is a supply of *such* men as are summoned upon the first pannel, in order to make up the deficiency. This was formerly done by a writ of *decem tales, octo tales*, and the like, directed to the sheriff, returnable at an early day, when the cause was again called on. But by stat 35 H. 8. c. 6. and other subsequent statutes, the judge is impowered to award a *tales de circumstantibus*. This, however, is in a great measure rendered useless, by the stat. of 3 G. 2. c. 25.; for as there are always a sufficient number of common jurymen returned, a *tales de circumstantibus* is not wanted in common causes. And if a *tales* is prayed in special jury causes, which is generally done, for it is very rare that twelve special jurymen attend, they are taken from among those who attend on the common jury. In such cases, however, they are deemed *tales de circumstantibus*, (and not improperly, though perhaps not strictly so, according to the original construction of the term,) and are afterwards so recorded in the *postea*.

Of the mode of
returning a
common jury,

As we have already shewn how a special jury is struck and returned, I shall just briefly point out the mode of returning common juries, which will render what has been said more clear and comprehensible.

according to
3 G. 2. c. 25.

A common jury is one returned by the sheriff, according to the directions of the stat. 3 Geo. 2. c. 25. which appoints, that the sheriff or officer shall not return a separate pannel for every separate cause, as formerly, but one and the same pannel for every cause to be tried at the same assizes, containing not less than forty-eight, nor more than seventy-two, jurors; and that

Of challenging the Jury, and of Tales Men.

that their names, being written on tickets, shall be put into a box or glass, and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused, or unless a previous view of the messuages, lands, or place in question shall have been thought necessary by the court; in which case, six or more of the jurors returned, to be agreed on by the parties, or named by a judge, or other proper officer of the court, shall be appointed by special writ of *habeas corpora* or *disfringas*, to have the matters in question shewn to them by two persons named in the writ; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest, previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors, when returned. 3 Blac. Com. 358.

How, if there has been a view.

All the names of the jurors must be drawn out of the box; and if another person, whose name is not in the box, answers to a name called, and by personating another juryman is sworn, the verdict will be set aside, as being a verdict only of eleven; for it is not a matter of challenge, nor is the defect cured by stat. 32 Hen. 8. *Norman v. Beaumont*, Bar. 453. *Russell v. Ball*, *ib.* 455.

If one juryman personates another, verdict will be set aside.

Such is the mode of obtaining a proper unexceptionable jury for the trial of the cause; and whenever twelve of the persons impannelled and not objected to, appear, or the number be made up by tales men, they are then sworn well and truly to try the issue joined between the parties, and a true verdict to give according to the evidence. Hence they are called a jury, *jurata*, and jurors, *juratores*. See 3 Blac. Com. c. 23.

SECTION IV.

Of nonsuiting at the Trial.

Of a nonsuit at
the trial, what.

When the jury are sworn, it becomes the duty of the plaintiff's counsel to enter upon his case; and it is incumbent upon him not only to prove by evidence *every fact* that is necessary to support it, but the facts, when proved, must be such as in point of law are sufficient to maintain an action: for if he fails in either of these respects, he will, under the direction of the judge, be nonsuited; nor will the defendant have occasion to go into the merits of his defence; whereupon the crier is ordered to call the plaintiff; and if neither he, nor any one for him, appears, he is then said to be nonsuited; the jurors are discharged; the action is at an end; and the defendant recovers his costs.

For by the old law no verdict could be given in the absence of the parties; and, therefore, when the jury returned to the bar to deliver their verdict, the plaintiff was bound to appear in court in order to answer the amercement, to which he was formerly liable if he failed in his suit. And though this amercement is disused, yet the form in the pleadings still continues the same, and his appearance in court in person, or by attorney, is as necessary now as formerly, before the jury can deliver their verdict.

But the plaintiff, if he pleases, may suffer a nonsuit at any time before the verdict be given, though after the full discussion of the cause, and the summing up of the judge in defendant's favour.

When therefore a plaintiff, or his counsel, imagines that sufficient evidence has not been given to maintain the issue on his part, and apprehending the verdict likely to go against him, it is usual for him to be voluntarily nonsuited by withdrawing himself; and he has his advantage in this, rather than suffer a verdict to be given against him upon the merits; for after a judgment of nonsuit, he may bring another action upon the very self

Advantages in
certain cases of
a nonsuit;

Of nonsuiting at the Trial.

self same ground of complaint; which he cannot do after a verdict against him upon the merits.

But if once he suffers the jury to pronounce their verdict, he cannot prevent its being recorded and elect to be nonsuited. must be before verdict pronounced.

In an issue out of Chancery, on a motion for a new trial because the defendant had produced evidence by surprise, which the plaintiff, if prepared, could have answered; one main reason for denying the motion was, that the plaintiff suffered a verdict to be given when he might have been nonsuited; which I mention as a caution in cases of the like kind. *Bull. Ni. Pri. 326, Richards v. Syms.*

At *nisi prius* the cause was called and jury sworn; but no counsel, attornies, parties, or witnesses appeared on either side. *Per Pratt. C. J.* the only way is, to discharge the jury; for no body has a right to demand the plaintiff but the defendant; and, therefore, defendant not demanding him, I cannot order him to be called. *Arnold v. Johnson, Str. 267.* No nonsuit if neither side appear.

After a jury is sworn and charged with the evidence, they cannot be adjourned; nor can the cause, even upon the petition and consent of both parties, be adjourned by the judge at *nisi prius* for difficulty into bank. *Dawson v. Howard, Ld. Raym. 129.* Cause cannot be adjourned after jury sworn.

If plaintiff, upon defendant's moving to change the venue, undertakes to give material evidence in the county of A. in order to retain his venue where he lays it, and afterwards at the trial gives no material evidence in that county, but fails therein, he must be nonsuited; and if the jury should give a verdict for him, the same will be set aside, and a nonsuit entered. *Santler v. Heard, C. P. 2 Blac. Rep. 1031.* In what cases plaintiff will be nonsuited; if on undertaking to retain venue, he does not give material evidence agreeable thereto.

Where there is judgment by default against one defendant in a joint action, the other cannot nonsuit the plaintiff at the trial on issue joined by him; nor if the plaintiff neglect to proceed to trial, can he obtain judgment, No nonsuit in joint action, where one defendant has let judgment go by default;

Of nonsuiting at the Trial.

ment, as in case of a nonsuit. *Weller v. Goyton*, Burr. 358.

plaintiff need only give evidence to affect the rest.

In trespass against several, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest; and it is matter for the jury whether the trespass proved be the same as that confessed; but the plaintiff cannot be nonsuited. *Harris v. Batterley*, Cow. 483.

Of the nonsuit where record carried down by proviso.

In all causes where both parties are actors, as prohibition, replevin, &c. if defendant carries down record by *proviso*, and the plaintiff does not appear, on whom the proof of the issue lies, the cause cannot be tried on defendant's record and a verdict entered, but plaintiff should be called and nonsuited. If a verdict be obtained, it will afterwards be set aside; and it will then be too late to enter a nonsuit, for it cannot be recorded in bank; but must be done by the judge at *nisi prius*, *Gardner v. Davis*, B. R. 1 Wil. 300. *Hicks v. Young*, C. B. Bar. 458.

After nonsuit, costs must be paid before second action proceeded in.

After a nonsuit, the court will stay proceedings in a second action between the same parties for the same cause, until the costs of the nonsuit are paid, notwithstanding plaintiff be a prisoner at the time of bringing the second action, and sue *in forma pauperis*. *Welson v. Withers*, 2 D. & E. 511. *Moulton, qui tam. v. Bingham*. Ib. N. *Baldwin v. Richards*. Ib. N.

Formerly nonsuit could not be set aside.

Formerly it was held, that a nonsuit could not be set aside though occasioned by the mistake of the judge. *Hartly v. Atkinson*, Bar. 317. *Love v. Day*, Bar. 311.

Settled practice now otherwise.

But in the case of *Sadler v. Evans*, Burr. 1986. the court were unanimous both upon principles and authorities, that where a judge at *nisi prius* nonsuits the plaintiff and is mistaken, the court, upon motion, may set aside the nonsuit.

And this is now the settled practice in both courts.

Of nonsuiting at the Trial.

The court will not set aside a nonsuit voluntarily suffered by plaintiff, and give him leave to reply *de novo*, so as to put the issue on another footing than he before had done. *Hutchinson v. Brice*, Burr. 2692.

In what case court will not set it aside.

SECTION V.

Of References at Nisi Prius.

It often happens at the time of trial, that causes are referred by consent to arbitration; for which purpose an order of *nisi prius* is drawn up, by the associate if at the assizes, and by clerk of *nisi prius* if at the sittings.

How reference made, and what done in consequence thereof.

The respective attorneys should set down the names of the witnesses proposed to be examined on the reference, and deliver the same to the crier, who will swear them at the bar of the court; for which he is paid 2s. each witness. If the witnesses are not sworn in court, they must attend a judge to be sworn.

Witnesses to be sworn.

When plaintiff's attorney wishes to proceed on the reference, let him procure the order of *nisi prius* from the proper officer, as above, and get the arbitrator to appoint a time and place for the parties to meet, (which should be in writing,) then annex a true copy thereof to a copy of the order of *nisi prius*, and serve both on the defendant's attorney (as it may be afterwards necessary to make affidavit of such service); the attorneys on both sides should deliver to the arbitrator short briefs of their client's case, with the names of the witnesses sworn to be examined, and all necessary papers, &c.

How plaintiff's attorney to proceed.

The arbitrator may adjourn from time to time, so as he makes his award within the time limited in the order.

If he does not make his award in the time, the time may be enlarged by consent, but not without; and in order to obtain such an enlargement, it is first necessary to make

How to enlarge time by consent.

Of References at Nisi Prius.

make the order of *nisi prius* a rule of court, which is a motion of course; after which, briefs must be given to counsel, the one to move, and the other to consent to such enlargement; clerk of rules will then draw up rule, for which pay 6s.; plaintiff's attorney must serve copy thereof on defendant's attorney, a new appointment fixed by the arbitrator, and a service thereof made as above.

When the award is made, the arbitrator's attorney should give notice to the attorney on each side, that the award is ready for delivery, and that the respective parties may have their part on paying for the same.

If the party in whose favour the award is made, accept his part thereof, and the other against whom it is given, refuses to accept his, a tender thereof should be made; and upon affidavit of such tender and refusal, a rule may be obtained to make the order of *nisi prius* a rule of court, and a copy thereof served on the refractory party. If this rule be disobeyed, upon affidavit of personal service of a copy thereof and disobedience thereto, an attachment will be granted.

If the party does accept the award, but refuses to obey it, make the order of *nisi prius* a rule of court; make a copy of such rule and of the award, serve them on the other party, and at the same time demand the money awarded; which, if refused, make affidavit of the facts, and move for an attachment.

In whose favour the award is made, costs are of course given as to the suit; therefore get an appointment from the master on the rule, which serve on the other attorney, and get same taxed accordingly; annex a copy of the master's allocatur to the copy of the rule and the award, serve the copies personally on the other party, and at the same time shew the original order and award; if not complied with, move as above for attachment or affidavit of the service of the rule and allocatur for costs and the demand of the money; and also an affidavit of the due execution of the award made by one of the witnesses.

The

Of References at Nisi Prius.

The rule for the attachment is carried to the crown office in the Temple, and the attachment there bespoke; when obtained, a warrant thereon is got from the office of the sheriff of the county wherein the party to be attached resides, and executed accordingly.

If bail has been given in the cause proposed to be referred, it is the safest way for plaintiff to take a verdict for any certain sum, subject to the reference; for otherwise the bail will be discharged. This, therefore, is frequently done; and the plaintiff, after the award is made in his favour, has the election to proceed either to execution upon the verdict, or by attachment upon the award. But as in the latter case he cannot sue out an attachment, so in the former he cannot enter up judgment without leave of the court; the necessary steps therefore, to ground such application are, in both cases, nearly the same.

Of references at nisi prius, where verdict is taken for security.

After the award is made, let the costs be taxed and the rule and award copied, a service of copy thereof and a personal demand of the sum awarded, with the costs made; and upon affidavit of such service with the master's *allocatur* a copy of the award, and demand of the money, the court may be moved.

If plaintiff means to proceed on the verdict, he should give a rule for judgment in the usual way; he may then move the court, that the *postea* may be delivered to plaintiff, and that he may be at liberty to sign judgment and take out execution for the money awarded and costs; and that the master may tax the costs of that application. A rule *nisi* is granted, and if no cause shewn, made absolute upon affidavit of service in the usual way.

Upon this rule the marshal or associate will deliver the *postea*; which get stamped; then sign judgment with the master, who will tax the costs, and proceed to execution for the sum awarded, and costs, but no more.

If

Of References at Nisi Prius.

If the award be for a less sum than the verdict, the plaintiff may levy the equitable costs out of the excesses. Imp. B. R. 5. Ed. 653.

At the election of plaintiff, to proceed on verdict or award.

If a rule be made at *nisi prius* to refer a matter to the three foremen of the jury, and that the plaintiff shall have a verdict for his security, after the award made, the plaintiff may either enter up judgment on the verdict, or have an attachment for not obeying the rule of court, it being in his election which way he will execute the award; and this was affirmed to be the constant practice. Tourton and Gould (in the absence of the chief justice) doubted of it, because the verdict stood still on record. To which it was answered, there could not be a judgment entered on such verdict without leave of the court, and the attachment was granted. *Hall v. Mifler*, Salk. 84.

If he proceeds on verdict, there must still be verdict of due execution of award, and the like.

Verdict for plaintiff for security. Reference by rule to three of the jurors. Award in plaintiff's favour, rule obtained to shew cause why the *posse* should not be delivered to plaintiff, to take out execution for the money awarded. Objection by defendant, that no affidavit was produced of the due execution of the award, or of a demand of the money; which the court held to be as necessary as if the motion had been for an attachment; and the rule was discharged. *Read v. Garnett*, Bar. 58.

9 & 10 Wm. 3. does not extend to awards made under references at *nisi prius*.

The 9 and 10 W. 3. c. 15. s. 2. which limits the time of complaining against awards to the last day of the next term after the award made, extends not to such as are made in pursuance of a rule of *nisi prius*, but only where the submission is by obligation; and nothing is a ground within that statute for the court to set aside an award, but manifest corruption in the arbitrators: We will not unravel the matter, and examine into the justice and reasonableness of what is awarded. *Per Cur.* in *Anderson v. Coxeter*, Str. 301. So *Lucas and Wilson*, Burr. 701.

Attachment only a civil execution.

It has been settled of late years, that an attachment for non-performance of an award is only in the nature of

Of References at Nisi Prius.

of a civil execution, and therefore the party cannot be apprehended thereon on a Sunday, though there is a case in 1 Atk. 58. to the contrary. Party not to be taken on Sunday.

So a person in custody upon such an attachment, is entitled to be discharged under the Lord's act. *The King v. Myers*, 1 D & E. 266. Cow. 136. Party may be discharged on Lord's act.

SECTION VI.

Of Bills of Exception, and Demurrers to Evidence.

Nothing can be more important to the ends of justice than that certain rules should be established and adhered to, with respect to the admissibility or inadmissibility of evidence upon the trial of a cause; but inasmuch as, from the nice and complicated nature of such rules, the best of judges may be sometimes liable to err, by rejecting, or allowing improperly, any particular species of testimony; the law has provided for the benefit of the subject a remedy in this respect, by enabling the injured party to bring the question in dispute before the same court, or some other tribunal, for their decision on the propriety or impropriety of the judge's admitting or rejecting such evidence; and this may be done according to the circumstances of the case, either by bill of exceptions, or by demurrer to evidence. Use and meaning thereof.

If the judge at *nisi prius* either in his directions or decisions mistakes the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of exceptions*, stating the point wherein he is supposed to err: And this he is obliged to seal, by statute Westm. 2. 13 Edw. 1. c. 31. or if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: And if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. Bill of exceptions, what.

This

Of Bills of Exception, and Demurrer to Evidence.

Demurrer to
evidence, what.

This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below. But a *demurrer to evidence* shall be determined by the court out of which the record is sent. This happens, where a record or other matter is produced in evidence, concerning the legal consequences of which, there arises a doubt in law; in which case, the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law, to maintain or overthrow the issue, which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court. 3 Blac. Com. 372.

How fell into
disuse.

Such, indeed, formerly were the usual modes of redress; but of late years, since the extension of the discretionary power of the court in granting new trials, questions of misdirections of judges at *nisi prius*, and the like, have been brought before the court, and canvassed in the shape of motions for new trials; and bills of exceptions and demurrers to evidence are now very rarely resorted to.

For which reason, I shall here content myself with referring my reader, as well for further information on the subject, as also for the respective forms of a bill of exceptions and demurrer to evidence, to Buller's *Nisi Prius*, 313 to 320, and the following cases: *Money and others v. Leach*, Bur. 1692. *Symers and another v. Regem*, Cowp. 500. *Davies v. Pierce*, 2 D & E. 53. and *Gibson and Johnson v. Hunter*, 2 C. B. T. R. 198. where there is a modern precedent of a demurrer to evidence and joinder.

SECTION VII.

Of Verdicts and Cases reserved.

- A. Of General Verdicts.
- B. Of Special Verdicts.
- C. Of Cases reserved.

The cause having been gone through, and the judge having summed up the evidence to the jury, whose determination the plaintiff is willing to await, and not to suffer a nonsuit, the jury, after having sufficiently deliberated, and satisfied themselves of the truth of the matter in issue, proceed to give their verdict.

A verdict, therefore, (*vere dictum, quasi dictum veritatis*, Co. Lit. 226.) is the answer of a jury given to the court concerning the matter of fact, in any cause committed by the court to their trial and examination.

A verdict, what:

In ancient times, if the jury (in civil causes) were not unanimous in their opinion, the majority might give a verdict, and judgment was given *ex dicto majoris partis juratorum*; nay, jurors might even bring in a verdict upon their belief only. Reeve's Hist. 2. 268.

Formerly given by majority of jurors;

But, in the reign of Edward 3d, this practice was exploded; certainty and unanimity became requisite. It was held by the court, that a verdict from eleven jurors was no verdict at all; and, though a particular precedent of a former judge was urged, Thorpe, one of the justices, said, that it was no example for them to follow, for that judge had been greatly censured for it. And it was said by the Bench, that the justices ought to have carried the jurors about with them in carts till they were agreed. From this period, therefore, it has ever been held, that jurors must be unanimous in their verdict. Reeve's Hist. 3. 100.

afterwards made necessary to be unanimous.

There are two kinds of verdicts, general and special, or, as it is sometimes called, a verdict *at large*.

Two kinds of verdicts.

A general

Of Verdicts and Cases reserved.

General verdict,
what.

A general verdict is when the jury find generally for the plaintiff or defendant, without alleging any special matter, but merely affirming or negating the issues joined between the parties.

As in an action upon promises, wherein defendant pleaded the general issue *non assumpsit*; the jury, by a general verdict, if they find for plaintiff, say, That defendant did undertake and promise, &c. if for defendant, That he did not undertake and promise, and the like; always following the words of the several issues.

Sometimes a general verdict is given for plaintiff upon some of the issues, and for defendant upon the other issues; in which case, the foreman of the jury mentions the issues, which they find for each respectively, and the verdict is still recorded in the words of the issues, affirming or negating them as they have been respectively found.

Of public and
privy verdicts.

A verdict may also be either public or privy. Public, if given in open court; privy, if given out of court before any of the judges; in which case, it must afterwards be confirmed in open court, and a jury may, if they think fit, vary from it, so that it is tantamount to no verdict. In criminal cases, a privy verdict cannot be given. 3 Blac. Com. 377.

N. B. When the judge adjourns to his own lodgings, and there receives the verdict, this is a public, not a privy verdict.

Verdicts, how
recorded.

Of the *poslea*.

The verdict, when found, is to be indorsed on the record, which forms what is called the *poslea*; of which hereafter. If the trial be at the sittings in London or Middlesex, the *poslea* is immediately delivered to the party obtaining the verdict, who makes the proper indorsement; but, if tried at the assizes, the associate keeps the record, and indorses the *poslea*, and afterwards delivers it to the party.

Much might be here said upon the effect and operation of general verdicts, in what cases they may be altered

Of Verdicts and Cases reserved.

altered or amended; when they shall be deemed bad from the misbehaviour of the jurors, or of the parties; when inefficient in point of law, by being found on immaterial issues, or by not finding all that was in issue, or the like: But as the first of these points come more immediately into consideration under the head of *postea*, and the other two under the heads of motions for new trials, and in arrest of judgment, I must refer the reader to those sections in the next chapter.

15. Of Special Verdicts.

15.

If there arise in the case any difficult matter of law, the jury, for the sake of better information, and to avoid the danger of having their verdicts attained, will find a special verdict, which is grounded on the stat. West. 2. 13 Edw. 1. c. 30. s. 2.; and herein they state the naked facts as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion, that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried; if neither party be dissatisfied with the judgment of the court, they may carry it up to the dernier resort, the house of lords, by writ of error.

Special verdict
what.

A special verdict should be drawn with as much conciseness as the nature of the case will admit.

In finding special verdicts where the points are single and not complicated, and no special conclusion, the counsel (if required) do subscribe the points in question, and agree to amend the omission of mistakes in the mesne conveyance according to the truth, to bring the point in question to judgment.

The unnecessary finding of deeds in *hac verba*, where the question rests not upon them, but are only derivation of title, should be spared, and found shortly according

K k

Of Verdicts and Cases reserved.

According to the substance they bear in reference to the deed, as feoffment, lease, grant, &c. R. M. 1654. f. 20.

How to proceed
to get special
verdict argued.

In B. R.

When a special verdict is found, it is drawn and settled by the counsel on each side from the notes taken at the trial, who respectively sign the same; plaintiff's attorney having first got his counsel to peruse and sign it, and then given it to defendant's attorney for the like purpose; it is then left with clerk of nisi prius, or associate, who makes out copies for each party; the roll is then completed by the verdict being entered thereon, and docketed, and filed; a concilium is moved for, a rule got thereon from clerk of rules, and carried to the clerk of papers, who enters the cause for argument, and a copy of rule is served on defendant's attorney.

The cause must be set down within the first four days of the term, or leave of the court specially obtained for that purpose, and books must be delivered to the judges, containing the whole record and special verdict, two days before argument: Plaintiff's attorney delivers two to the C. and senior judge, and defendant's attorney, two to the other two judges. The proceedings as to getting the special verdict argued, being the same as on demurrer.

Be the verdict in whose favour it may, the rule of court is drawn up and costs taxed immediately, without a rule being given

In C. B.

When a special verdict is found, it is settled and signed by two serjeants, and left with the associate, who makes out copies for each party; plaintiff's attorney then carries it to prothonotary's; the clerk will make out six copies of the proceedings, with the special verdict, four for the judges and two for the serjeants; three of these copies are for defendant's attorney, who must pay for same; if he refuses, plaintiff's attorney may deliver the four to the judges, and defendant's counsel will not be heard on argument. Let it then be entered on the roll; move for concilium; carry roll to secondary's, and let it be in court; secondary will mark roll, and draw up rule for concilium; and will also set the cause down for argument; copy of rule must be served on the attorney of the other side.

When judgment given, draw up rule for judgment, and tax costs as in other cases.

The books must be delivered to judges one week at least before the day of argument, two by plaintiff's attorney to the two senior judges, and two by defendant's attorney to the other two judges.

But if either attorney neglects to deliver books on his part, the other may deliver them three days

Of Verdicts and Cases reserved.

given for judgment, and execution may issue thereon. But the other party may have a rule to be present at the taxing of costs, as in other cases. Imp. B. R. 352. 3d Edit.

days before argument, and shall be paid for same by the opposite attorney on demand, or he shall be allowed these in his costs; or if no costs taxed, he may compel payment by attachment. Rule East. 27 Car. 2.

This rule formerly extended to demurrers also; but a subsequent rule of 6 G. 2. Reg. 3. has altered the time of delivering the demurrer books to two days before argument; but this old rule of Car. 2. still holds good as to special verdicts; which makes a difference in the practice of the two courts in this respect.

C. Of Cases reserved.

C.

Formerly when any serious legal doubts arose at the trial, special verdicts were the only mode in which the point could be formally brought before the court for their determination; but in later times a more easy and expeditious method is adopted; instead of the jury finding a special verdict, and the matter at large being set forth upon the record, they give a verdict generally for the plaintiff, subject, nevertheless, to the opinion of the court above, on a special case stated under the direction of the judge and the advocates on both sides.

Cases reserved introduced instead of special verdicts.

This does not constitute a part of the record, and is attended with less expence than the finding of a special verdict. On the other hand, it has this disadvantage, that as nothing appears on the record but the general verdict, it cannot like the latter be removed by writ of error, so as finally to await the determination of the lords in parliament. If, therefore, the matter in question be of such moment and nicety as to induce either party to think that it may be advisable to carry it to the *dernier resort*, in case the judgment of the court should be unfavourable to him, he must not consent to

Special case no part of the record.

Of Verdicts and Cases reserved.

take a case reversed, but must bring it on in the shape of a special verdict.

By whom postponed kept till cause determined.

The *poslea*, when a case is reserved, remains in the hands of the clerk of *nisi prius*, or associate, till the matter is determined, and a verdict is then entered accordingly.

How to proceed to get case argued.

The attorneys get the special case settled and signed by the counsel or serjeants, it is then carried to the associate, who makes out copies for the parties; a concilium is moved for; the rule served on the attorney of the other side, and proceed to set case down, to deliver books, and to go on to argument in same way as in special verdicts.

Before the *concilium* is moved for, the case ought to be accurately settled as to dates and every other particular, so as not to trouble the court with any further application after it is set down in the paper. Formerly, indeed, the court themselves used to order demurrers or cases to be set down for argument according as upon inspection they found them deserving; but of late years they have trusted this to the discretion of counsel, upon whose signature only *conciliums* are granted of course.

In a case for the opinion of the court, the facts proved at the trial ought to be stated, and not the evidence of facts only. *Palmer v. Johnson*, 2 Wil. 163.

When a suit is reserved at *nisi prius* for the opinion of the court, which is a practice introduced in lieu of a special verdict, the verdict ought always to be for the plaintiff; and the rule of *nisi prius* ought to be to the following effect: That if the court should be of opinion for the defendant, that then judgment of nonsuit should be entered, otherwise the defendant could have no remedy in case of the plaintiff's death. *Moyse v. Cockledge*, Bar. 460.

SECTION VIII.

Of Judge's Certificates for Costs.

Of the several statutes respecting costs, there are some of which the party can only take advantage by getting the judge to certify at the back of the record at the time of trial. It is, therefore, highly necessary to know in what cases this application should be made, and to be cautious not to lose the opportunity, which only offers itself at this stage of the suit.

Some certificate must be obtained at the trial.

And first, in the common case of special juries, the charges thereof will not be allowed, unless the judge certifies at the trial; for by 24 G. 2. the party moving for special jury shall pay the whole expence, and not be allowed it, unless the judge before whom the cause is tried, *shall, immediately after trial, certify in open court, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury.*

Thus for the costs of special jury.

So in all cases of assaults and battery, where the damages are under 40s. the plaintiff, in order to get his full costs, must at the trial get the judge to certify, that an assault *and battery* was proved, or that the freehold or title to the land was chiefly in question; for the words of the statute 22 & 23 Car. 2. c. 9. are, "That in all actions of trespass, assault, and battery, and other personal actions wherein the judge *at the trial* of the cause shall not find and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question; the plaintiff, in case the jury shall find damages under the value of forty shillings, shall not recover more costs than the damages so found shall amount unto."

So in all cases of assault and battery, where costs under 40s. certificate that battery was proved, or freehold came into question, must be at the trial.

Stat. 22 & 23 Car. 2.

So a certificate according to the stat. 8 & 9 W. 3. c. 11. that the trespass was wilful and malicious, in order to give plaintiff his full costs where damages are found under 40s., must be made in court, or it is void.

So certificates that trespass was wilful. 8 & 9 W. 3. c. 11.

K k 3

Again,

Of Judge's Certificates for Costs.

So for double costs in actions against justices, &c. where verdict is for them.

Again, in all actions brought against justices, mayors, church-wardens, parish officers, constables, &c. where, if a verdict pass for them, or plaintiff be nonsuited, double costs are given, by the statutes 7 Jac. 1. c. 5. & 21 Jac. 1. c. 12. ; in such case, the judge should certify at the trial that they were acting in the execution of their office, or make an allowance of double costs upon the record.

So where verdict is against them.

In like manner, in actions against justices, where, by statute 24 G. 2. c. 44. plaintiff is entitled to double costs, if a verdict pass for him, and the judges certify, that the injury was wilfully and maliciously committed, the judge should certify to that effect at the trial in open court, on the back of the record.

Where not necessary.

But where there is a special verdict, and it appears by the facts found, that defendant was acting as justice, &c. no certificate is necessary. *Rann v. Pickins*, Do. 308.

What certificates for costs need not be till after trial :

But there are some statutes respecting costs, where a certificate is necessary, but need not be obtained till after the trial of the cause.

Those under 43 Eliz. c. 6.

Such is the case with respect to the certificate upon the 43 Eliz. c. 6. which enacts, That if upon any action personal, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judge, that the debt or damages to be recovered be under 40*s.* and so signified and set down by him, the plaintiff shall have no more costs than damages.

It has been held, that this certificate may be obtained after the trial. *Holland v. Gore*, Say. on Costs, 18.

To what actions that statute extends.

This statute extends to all personal actions not particularly excepted ; even to an action of trespass *vi et armis* for beating plaintiff's dog. *Dand v. Sexton*, 3 D. and E. 37.

So

Of Judge's Certificates for Costs.

So a certificate, according to the 4 and 5 Anne, c. 16. § 6. may be granted after the trial, the words being, "That if a verdict shall be found upon any issue in the said cause, for plaintiff or demandant, (meaning where there are double pleas,) costs shall be given in like manner, unless the judge certify the defendant, or tenant, or plaintiff in replevin, had probable cause to plead such matter, which upon the said issue shall be found against him," &c.

So certificates under 4 and 5 Anne, of probable cause, to plead certain pleas.

In all the above cases, therefore, where the judge should certify at the trial, it is of importance to obtain such certificate, as it will afterwards be too late, and it cannot be cured by any motion in court, grounded on any affidavit, praying leave to enter a suggestion on the record. *Grindley v. Holloway*, Do. 307.

Consequence of neglecting to get certificate at trial, when statute requires it.

Kk 4

CHAPTER XI.

Of Proceedings from Trial to Execution.

SEC. 1. *Of the Postea and Rule for Judgment.*SEC. 2. *Of new Trials.*SEC. 3. *Of arresting the Judgment.*SEC. 4. *Of taxing Costs, and signing final Judgment.*SEC. 5. *Of docketing Entries and Judgments.*

If special verdict, how to proceed has been shewn ante, sect. 7. ch. 10.

IF the verdict of the jury be a special verdict, or if there be a case reserved at the trial for the opinion of the court, we have already shewn how to proceed, in the seventh section of the last chapter; but if it be a general verdict, whether a special jury cause or not, the proceedings are as follow:

In B. R.

If it be a trial at the sittings, the associate, immediately after the verdict is given, makes a minute thereof, and delivers the postea, with distringas and pannel annexed, to the attorney whose client has obtained the verdict, and he takes care to indorse the postea properly.

But if it be a trial at the assizes, the associate keeps the record till the next term, and in the interim, indorses the postea, for which a fee is paid at the trial.

The next thing to be done, is to take out a rule for judgment on the postea.

In C. B.

In this court, the associate keeps the record, and indorses postea thereon, whether it be tried at assizes or at the sittings.

If the cause is tried in term, he will deliver same about the fifth day after term; if in vacation, it may be had in the first week of the subsequent term.

There is no rule given for judgment in this court, but you must wait the same time, four days exclusive, as in K. B. which is allowed the other side to move for a new trial, or in arrest of judgment. When the time is expired, the postea having been got from the associate,

This

How to proceed to judgment on a general verdict.

As to the postea.

If at sittings.

If at assizes.

As to the rule for judgment.

Of the Postea and Rule for Judgment.

This may be given upon the return-day of the distringas, so if proceedings be by original, unless such return-day be a Sunday.

It is written on a slip of paper thus: A. v. B. rule for judgment on postea, or on inquiry (if it be after writ of inquiry). Dated,

T. S. plaintiff's attorney.

This is a four-day rule, exclusive of the day it is given. If Sunday or a dies non intervenes, it is no day, for four whole court-days are allowed.

Pending this rule, the other side may move for a new trial, or in arrest of judgment. If no such step is likely to be taken, let the attorney, who hath obtained the postea in the meantime, get it stamped with a double half-crown stamp at the stamp-office. Then carry same to clerk of common bails, at the King's Bench office, who will mark the same deliberatur, as it is called, thus: Delivered of record, such a day and year, and signs his name; pay 6d. for entering.

N. B. If it be writ of inquiry, there is no postea or any thing stamped; but the double half-crown stamp is for the master to sign final judgment on.

When rule on postea or inquiry is out, carry same, with papers in cause, to the Master in B. R. and protibonotary in C. B. who will sign final judgment and tax costs; for which see post, sect. 4.

The rule for judgment ought not to be entered before the day in bank, and is not necessary, if the plaintiff be

ciate, get it stamped at stamp-office with a double half-crown stamp; then carry it to the protibonotary, with papers in the cause, who will sign final judgment, and tax costs.

When judgment is signed, or costs taxed on postea or inquiry, the record or inquisition must be delivered to the clerk of the judgments for him to keep, nor can it be taken out of the office afterwards, without leave of court on motion. R. Trin. 13 G. 2.

How to sign final judgment.

Rule for judgment, when to be entered.

Of the Postea and Rule for Judgment.

be nonsuited; for, in that case, judgment may be entered immediately after the day in bank. N. on R. E. 5 G. 2.

Postea, its purpose, and why so called.

The *postea* is as a return of the judge before whom the cause is tried, after a verdict of what was done therein; it is indorsed on the back of the *nisi prius* record, and is a continuation of the proceedings from the *distringas*; it has its name from the word *postea*, AFTERWARDS, being the first word of the subject-matter indorsed.

Form of *postea*.

The form of a *postea*, in a special jury cause where a *tales* was prayed, and which, by leaving out the *tales* part, may be converted into a *postea* on a common jury cause, is as follows:

Afterwards, (that is to say,) on the day, and at the place within-mentioned, before the right honourable Lloyd Lord Kenyon, the chief justice within-written, Roger Kenyon Esq. being associated unto him, according to the form of the statute in that case made and provided, came the within-named A. B. by his attorney within contained, and the within-named C. D. although solemnly required, came not, but made default; therefore, let the jury, whereof mention is within made, be accepted of against him by his default; and the jurors of that jury being summoned, some of them, (that is to say,) [here name only the jurors that appeared on the pannel], and because the residue of the jurors of the same jury do not appear, therefore other persons, of those standing by the court by the sheriff of the county aforesaid, at the request of the said A. and by the command of the said chief justice, (if in London or Middlesex, if at the assizes, then by the command of the said justices,) are now newly set down, whose names are affixed in the within-written pannel, according to the form of the statute in that case made and provided, which said jurors, so newly set down, (that is to say,) K. L. of, &c. barberdasher, (naming the rest of the *tales* men,) being required, came, who, together with the said other jurors, before impanelled and sworn to declare the truth of the within contents, being elected, tried, and sworn upon their oath, say, That the said C. D. did undertake and promise, in such manner and form as the said A. hath within complained against him; and they assess the damages of the said A. B. by reason of the not performing the promises and undertakings within-written, besides his expenses and costs laid out by him in this behalf, to 12l. and for those costs and charges to 40s. therefore, &c. Imp. B. R. 372.

In

Of the Postea and Rule for Judgment.

In case the judge of assize die after verdict, and before the day in bank, the clerk of assize returns the *postea* with a special entry. Sal. 671.

How if judge dies after assizes and before term.

Of altering and amending the Postea.

If the associate makes a mistake by marking wrong damages on the *postea*, and the notes of the judge before whom the cause was tried are otherwise, the *postea*, on motion, may be amended by the judge's notes. *Newcomb v. Green*, 1 Wil. 33.

Postea amended by judge's notes; in what cases.

So if there be a verdict for plaintiff generally, and he omits to enter up the verdict on all the issues, court, on motion, will amend the *postea*; and as it is a mere slip, such amendment may be after error brought. *Petrie v. Hannay*, 3 D. & E. 659.

If verdict general, and not entered on all the issues.

Again, if a general verdict and entire damages be entered when one of the counts is bad in law, and no evidence was given at the trial on such bad count, the *postea* may, on motion, be amended by the judge's notes. *Eddowes v. Hopkins*, Do. 376.

If verdict entered generally when one count is bad, provided no evidence given on that count;

I say where no evidence was given at the trial on such bad count; for this distinction was taken *per* Buller, Just. in same case. If there was only evidence at the trial upon such of the counts as are good and consistent, a general verdict might be altered from the judge's notes, and entered on those counts; but if there was any evidence which applied to the other bad or inconsistent counts, (as for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict,) there the *postea* cannot be amended, because it is impossible for the judge to say on which of the counts the jury have found the damages, or how they had apportioned them. In such case, therefore, the only remedy is, by awarding a *venire de novo*.

but not if evidence was given thereon.

In the case of *Grant v. Afle*, Do. 730. Lord Mansfield said, he exceedingly lamented that ever so inconvenient

This distinction disapproved of by Lord Mansfield.

Of the Postea and Rule for Judgment.

venient and ill-founded a rule should have been established, as that where there are several counts and entire damages, and one count is bad and the others not, this should be fatal, upon the fictitious reasoning that the jury had assessed damages on all, though, in truth, they never thought of the different counts, but the verdict was so taken from the inadvertence of counsel in the hurry of *nisi prius*. And what makes this rule appear more absurd is, that it does not hold in the case of criminal prosecutions; for when there is a general verdict of *guilty* on an indictment consisting of several counts, if any one of them is good, that is held sufficient: but in civil cases the rule is now settled, and the court have gone as far as they can in allowing verdicts in such cases to be amended.

Postea not amended to increase damages;

But the court will not amend the *postea* by increasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been to give the plaintiff such increased sum, and that they conceived the verdict was calculated to give him such. Such things should be explained at the trial. *Jackson v. Williamson*, 2 D. & E. 281.

nor verdict altered contrary to apparent intention of jury.

Nor will the court alter a verdict, unless it clearly appears on the face of it, that the alteration would be agreeable to the intention of the jury. Where, therefore, a jury bring in a verdict contrary to the notes or direction of a judge, the proper remedy is, to move for a new trial. *Spencer v. Gater*, 1 C. B. T. R. 78.

If verdict be for greater sum than laid in declaration, remittitur may be entered.

Where a verdict was given for a greater sum than the amount of the damages laid in the declaration, court will suffer amendment to be made by plaintiff, entering a *remittitur* of the *extra* sum; and this even after error is brought, on payment of costs, (notwithstanding the case of *Sandiford v. Bean*, Hil. 13 Geo. 3.) 1 C. B. T. R. 643.

At what time such amendment must be moved for;

An amendment of the *postea* must be moved for before judgment; it cannot be amended afterwards on error being brought; though the court may even then award a *venire de novo*. *Grant v. Afle*, Do. 730.

As

Of the Postea and Rule for Judgment.

As long as the record remains in court, amendments may be made; and though error is brought in the house of lords, the record still remains in B. R. only a transcript thereof being sent to the house of lords. whilst record is in court.

On a motion for a new trial, the *postea* was brought into court, and after a new trial had been denied, the *postea* could not be found; and the court, on debate, ordered a new one to be made out from the record above and the associates notes. *Dayrell v. Bridge*, Str. 1264. Postea lost, and a new one ordered.

SECTION II.

Of new Trials.

- A. Their Nature, Origin, and Utility.
- B. When and how to be moved for.
- C. In what Actions and Cases granted.
- D. Of the Costs in case of new Trial.
- E. How to proceed if new Trial granted.
- F. Of the Motion for a *venire facias de novo*, and the Difference between them and Motions for new Trial.

It has been observed, that four days from the return of the *disfringas*, are allowed to move the court for a new trial, or in arrest of judgment. B. The nature, origin, and utility of new trials.

No one, therefore, can have final judgment obtained against him by surprise.

We shall first treat of new trials, because a motion in arrest of judgment may be made after a new trial has been moved for and refused, but not *vice versa*.

Causes of suspending the judgment by granting a new trial, are at present wholly *extrinsic*, arising from matter foreign to or *dehors* the record: whereas arrests of judgments Difference between the grounds for new trial and in arrest of judgment.

Of new Trials.

judgments arise upon *intrinsic* causes appearing upon the face of the record.

Utility of new trials.

Trials by jury in civil causes, said Lord Mansfield, could not subsist now without a power somewhere to grant new trials.

If an erroneous judgment be given in point of law, there are many ways to review and set it right.

Where a court judges of fact upon depositions in writing, their sentence or decree may many ways be reviewed and set right.

But a general verdict can only be set right by a new trial; which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or perhaps a certainty that justice has not been done.

Writ of attaint out of use;

The writ of attaint is now a mere sound in every case; in many it does not pretend to be a remedy.

If not the inefficacy thereof.

There are numberless causes of false verdicts without corruption or bad intention of the jurors; they may have heard too much of the matter before the trial, and imbibed prejudices without knowing it; the cause may be intricate; the examination may be so long as to distract and confound their attention.

Most general verdicts include legal consequences as well as propositions of fact: in drawing these consequences the jury may mistake, and infer directly contrary to law.

The parties may be surprised by a case falsely made at the trial, which they had no reason to expect; and therefore could not come prepared to answer.

If unjust verdicts obtained under these and a thousand like circumstances were to be conclusive for ever, the determination of civil property in this method of trial, would be very precarious and unsatisfactory. It

Of new Trials.

It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of re-considering the cause by a new trial; and it is done in a way very favourable to the parties for whom the wrong verdict is given; it is upon payment of costs. Whereas, in other cases where a wrong judgment is reversed, costs are paid as if the right judgment had been given in the first instance.

New trials necessary to justice.

How costs paid in such cases.

It is not true, "That no new trials were granted before 1655," as has been said from Style 466.

When new trial first granted.

The reason why this matter cannot be traced further back is, "That the old report books do not give any accounts of determinations made by the court upon motions."

Indeed for a good while after this time, the granting of new trials was holden to a degree of strictness so intolerable, that it drove the parties into a court of equity, to have, in effect, a new trial at law of a mere legal question; because the verdict in justice under all the circumstances, ought not to conclude; and many bills have been retained upon this ground, and the question tried over again at law under the direction of a court of equity; and, therefore, of late years the courts of law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases; and the rule laid down by Lord Parker in the case of the *Queen* against the *Corporation of Heston*, H. 12 Ann. B. R. (see Lucas's Reports 202,) seems to be the best general rule that can be laid down on this subject, viz. "Doing justice to the party;" or, in other words, "attaining the justice of the case."

Court formerly strict therein;

gradually more relaxed.

The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances.

Reasons for granting new trial.

This power may be exercised at much less expence of time and money, therefore more beneficially for the subject, by the court of common law where the cause has been tried.

B. When

*Of new Trials.***B.** When and how to move for new Trial.

At what
time to be
moved for,

If the party against whom a verdict is obtained on trial, or judgment on inquiry of damages, wishes for a new trial or inquisition, he must move for the same within the four days, and the motion must be made in the court, supported by an affidavit of facts.

and how.

It is a rule to shew cause; and though no notice thereof necessary in B. R. it is fair practice to give it, that the other side may be aware on what ground the motion is made. In C. B. notice of motion must be given.

How the four
days reckoned:

In B. R. the four days for motions for new trials are inclusive; if the first day of term be the twenty-first, the 24th is the last day of moving. *Burt v. Barlow*, Do. 171. Bar. 445.

not after the
four days in
C. B.

So in C. B. a motion for a new trial cannot be made after the four days expired, though before judgment entered, unless the foundation of the motion be some matter discovered after that time. *Willis v. Bennett*, Bar. 443.

What done on
making the mo-
tion.

On motion for a new trial, the usual way is, to grant a rule to shew cause; and then the puisne judge of the court speaks to the judge who tried the cause, (if of another court,) and obtains a report from him of the trial, and also a signification of his sentiments on it; if the judge declares himself satisfied with the verdict, it hath been usual not to grant a new trial on account of its being a verdict against evidence; on the other hand, if he declares himself dissatisfied with the verdict, it is pretty much of course to grant it.

In B. R. in very
particular cases,
new trial moved
for after the
four days.

The court, under very particular circumstances, will permit a new trial to be moved for after the four days are expired. *Birt. v. Barlow*, Do. 171.

So in criminal cases. *The King v. Gough*, Do. 797.

Of new Trials.

If on motion for a new trial the court are divided in opinion, no rule is made; the party who obtained the verdict is at liberty to sign final judgment. *Cartledge v. Eyles* baronet, Bar. 442. How, if court divided.

A new trial may be granted a second time, if the reasons for granting it are sufficient. *Per Cur.* in *Goodwin v. Gibbons*, one, &c. Burr. 2108. It must depend upon the circumstances of the case. New trial granted second time,

But where there are two contrary verdicts, and the latter is satisfactory to the court, the losing party is not entitled by any rule of practice to a third trial. *Parker v. Anfel*, Blac. 963. except where two contrary verdicts.

But if on a second trial the jury find the same verdict as the former jury did, and the court are of opinion the verdict is against law, they will grant a third trial. *Tindal v. Brown*, 1 D. and E. 167. Third trial sometimes granted.

So, if they think the verdict clearly against evidence, a third trial will be granted. *Wilson v. Brough*, East. 24 G. 3. B. R.

If a new trial or inquisition be denied, the party may afterwards move on a similar affidavit to arrest the judgment; but if a motion in arrest of judgment be first made, and refused, you cannot afterwards move for a new trial. So it is of an inquiry; after motion in arrest of judgment, defendant cannot move for a new writ. Sal. 647. After motion refused for new trial, motion in arrest of judgment may be made, but not vice versa.

Ⓒ. In what Actions and Cases granted.

Ⓒ.

No new trial allowed in a writ of right, except the verdict be flagrantly wrong. *Tyssen v. Clarke*, Blac. 941. Not in writ of right.

In ejectment, the courts will seldom grant a new trial where the verdict is for the defendant, because the plaintiff may bring a new ejectment; but, where it is for the plaintiff, a new trial is often granted, for

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the

Of new Trials.

the consequence of not granting a new trial is the alteration of the possession of the premises. *Goodtitle v. Clayton*, Burr. 2224.

Not in penal actions, except in case of misdirection.

The courts never grant a new trial in penal actions. *Jervois v. Hall*, 1 Wil. 17. *Fonereau v. —*, 3 Wil. 59. and the case in 2 Keb. 226. held bad law, except upon the ground of misdirection by the judge. *Wilson v. Rastal*, 4 D. and E. 753.

Nor in actions for malicious prosecution.

Nor in an action for malicious prosecution, if verdict for defendant, though against evidence and judge's direction. *Norris v. Tyler*, Cow. 37.

How, in cases of information;

A new trial may be granted in an information in nature of a *quo warranto*, although denied in the case of *The King v. Bennet*, 1 Str. 101. the court saying, that of late years a *quo warranto* information had been considered merely in the nature of a civil proceeding, and that there were several instances since the case in *Strange*, in which a new trial had been granted. *The King v. Francis*, 2 D. and E. 484.

In a joint action where one is acquitted;

If in an action against two, one be acquitted and the other found guilty, that defendant can have no new trial. *Parker v. Godlin*, Str. 814.

where money is paid into court;

No new trial granted in any action where defendant has paid money into court, that being an acknowledgment of the action, *Burrough v. Skinner*, Burr. 2639.

where by agreement parties in several actions were to be bound by verdict in one;

Where, in several actions of a similar nature, it is agreed between the parties that they shall be bound by a verdict in one of the causes, it means such a verdict as the court thinks ought to stand as a *final* determination of the matter, and therefore does not prevent defendant from moving for a new trial, after a verdict in one of the causes for plaintiff. *Hodson v. Richardson*, Burr. 1477.

where there is a bill of exception.

When there is a bill of exceptions, a new trial shall not be moved for on the point of law contained therein. *Fabrigas v. Mostyn*, Blac. 929.

For

Of new Trials.

For the bill of exceptions is ordained by the legislature to be in nature of a writ of error. It would be unbecoming, therefore, in the court to stop it *in transitu*, unless the party will waive the bill of exceptions.

Value and importance are not of themselves sufficient grounds for granting a new trial, unless there be also some doubt in the question, though they frequently weigh in obtaining a rule to shew cause why there should not be a new trial. *Vernon v. Hankey*, 2 D. and E. 113.

What grounds for new trial.

Value and importance, how far.

Where verdicts have been given contrary to evidence, or where there hath been no evidence at all to support such verdicts, the court hath granted new trials; but if there hath been a contrariety of evidence on both sides, the courts have never granted new trials, notwithstanding the judge (before whom the cause was tried) hath been of opinion that the strength and weight of evidence was against the verdict. 1 Wil. 22. Anon. *Swain v. Hall*, 3 Wil. 47.

Of verdicts contrary to evidence, or where only contradictory evidence.

But the court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case, when they can see that plaintiff has obtained a verdict for such damages as he is entitled to in conscience and equity. *Slater v. Baker*, 2 Wil. 362. *Wilkinson v. Payne*, 4 D. and E. 468. *Aylett v. Lowe*, Blac. 1221.

If justice be not done to the parties;

For, though the ground of a verdict for the plaintiff be wrong, yet if no injustice be done to the defendant, or if the plaintiff can, by another form of action, recover as much, the court will not grant a new trial; but otherwise, where injustice is done him by it; and if it be not clear, the plaintiff may recover as much by another form of action. 4 Burr. 936.

It does not follow, by necessary consequence, that there must always be a new trial granted in all cases whatever, where the verdict is contrary to evidence; for it is possible that it may still be on the side of the real justice and equity of the case. *Ib.*

if justice done, court will try to support verdict.

Of new Trials.

The court will not grant a new trial, even where the jury have found for the defendant, against evidence, if the plaintiff appears to have received no real injury, and the damages (if the verdict had been for the plaintiff) would have been but a mere trifle. *Burton v. Thomson*, Burr. 664.

For, after a verdict on the honest and just side of the cause, the court will support it, if possible, and not grant a new trial. *Goslin v. Wilcock*, C. B. 2 Wil. 302.

No new trial
where merits
fairly tried,

Nor will the court ever grant a new trial, when they clearly see the merits have been fairly and fully tried. *Sampson v. Appleyard*, 3 Wil. 273.

though the
weight of evi-
dence against
the verdict.

Although the weight of the evidence may be certified by the judge to have been against the verdict, yet a new trial will be denied, if the nature of the action, the value of the matter in dispute, and other circumstances of the case, warrant such denial. For a new trial ought to be granted to attain real justice, but not to gratify litigious passions upon every point of *summum jus*. *Farewell v. Chaffey*, Burr. 53.

In which last case, a variety of cases are cited, in all of which the verdicts were against evidence, and the strict rule of law, or obtained through surprise: But the court would not give a second chance of success to a hard action, or an unconscionable defence.

No affidavits
admissible.

Nor will the court admit affidavits to explain evidence given at a trial, in order to found motions for a new trial thereon. *Hanson v. Parker*, 1 Wil. 257.

No new trial,
merely because
the verdict is
a hard one.

Where the verdict is neither against evidence nor law, though it be a hard one, no new trial will be granted. *Hankey v. Trotman*, Blac. 1.

In what cases
on affidavits of
jurymen.

The court will, under circumstances, grant new trials on the affidavits of jurymen, that the verdict was taken contrary to their meaning, but they are very cautious how they do this, as it may be of dangerous tendency.

Where,

Of new Trials.

Where, after a general verdict on both issues was given for defendant, eight of the jurymen stated, on affidavit, that they meant their verdict to have been for plaintiff on one issue, and the court were satisfied that would have been right, though they were doubtful what to do, not liking to send the parties to a new trial; they at length desired the counsel to move why the verdict should not be amended and set right, according to the truth of the finding, but no cause was shewn. *Cogan v. Ebdon*, Burr. 385.

New trial granted defendant in a criminal case upon the reports of the judge, and affidavits of the whole jury, that the verdict was taken contrary to their meaning, and to the judge's direction in point of law. *Rex v. Simmons*, 1 Wil. 329. Even in criminal case.

A jurymen's affidavit, with regard to his sentiments in point of law at the trial, ought not to be admitted, whatever may be the case of his affidavit, tending to rectify a mistake. *Rex v. Almon*, Burr. 2686. *Rex v. Thirkell*, Burr. 1696.

After a full trial by a competent jury, if no fresh light can be thrown in, a new trial shall not be granted, though the verdict might be contrary to the sense and meaning of the parties. *Camden v. Cowley*, Blac. 418. In what cases, in order to throw new light on the question,

There are cases where the court will grant new trials, notwithstanding there was evidence on both sides; as where all the light hath not been let in at the trial which might and ought to have been, as for want of all the subscribing witnesses to a release, set up by defendant, being called and examined. *Norris v. Freeman*, 3 Wil. 38. or introduce new evidence, or the like.

The court will not grant a new trial to let the party into a defence of which he was apprised at the first trial. *Vernon v. Hankey*, 2 D. and E. 113.

Nor for want of evidence which he might then have produced. *Coke v. Berry*, 1 Wil. 98.

Of new Trials.

A new trial shall not be granted because the counsel thought it prudent to omit evidence which they had in their briefs, and might have offered in mitigation of damages; nor because another jury, in a cause nearly similar, gave a different verdict. *Spong v. Hog*, Blac. 802.

Not granted to give the defendant an opportunity of proving the illegality of a policy which was not illegal on the face of it, for he should have shewn it on the trial. *Gist v. Mason*, 1 T. R. 84.

But discovery of new evidence by the attorney of defendant executor (then absent from England), though in the actual custody of the attorney himself, yet not known by him so to be, is a ground for a new trial. *Broadhead v. Marshall*, Blac. 955.

or where witness made a mistake in his evidence;

A new trial will not be granted on account of a mistake by a witness in giving his evidence. *Huist v. Keldon*, Say. 27.; although by affidavit he confirms it to be a mistake; and had it not been made, the verdict would have been different.

or verdict obtained by inadvertence;

But where a verdict is manifestly against equity, and obtained against defendant from inadvertence in not being prepared with evidence, court will grant new trial.

A verdict upon a trial was for plaintiff subject to the opinion of the court, upon this question, "Whether defendants, being sheriff's officers, (and who justified under a *fi. fa.*) ought upon the trial to have produced and proved a copy of the judgment on which the *fi. fa.* issued?" The court were of opinion, that the action being by a stranger to the original suit, the judgment ought to have been proved, and a copy produced; but *aliter* if the action had been by the person against whom the *fi. fa.* issued; therefore the plaintiff's verdict stood. But in this case the court gave defendants leave to move for a new trial; which was granted, because plaintiff had brought this action under a fraudulent bill of sale. And Lord Mansfield said, the verdict arises from a slip and inadvertence, and is against law and

Of new Trials.

and justice; the plaintiff has no merits; the bill of sale was fraudulent; plaintiff's son (against whom *fi. fa.* issued,) remained in possession; the recovery is manifestly contrary to reason and justice. *Martyn v. Podger* and others, Burr. 2631.

The *venire facias* was awarded by mistake returnable on the morrow of the Ascension instead of eight days of the Purification. The defendants, though their witnesses attended the assizes, made no defence at the trial, but confessed lease, entry, and *ouster*, and suffered plaintiff to take a verdict, relying on the mistake in awarding the *venire*, returnable at a day subsequent to the assize; till after which return and default made by the jurors, there could be no *nisi prius*. The jury process was made returnable at a proper day; and, on motion, the court held the variance material on the authority of two cases cited by the plaintiff's counsel. *Bastard v. al.* against *Bartlett*, Trin. 3 Geo. 2. *Dale v. Holmes*, Mich. 4 G. 2. in B. R. verdict set aside on payment of costs. *Woden v. Saunders*, Bar. 460.

or where *venire facias* wrong awarded, or the like;

Want of due notice is a proper ground for a motion for a new trial; but the defendant is precluded if he appear at the trial and make defence. Sal. 646.

or for irregularity in not giving notice of trial;

Though the issue delivered varied from the record of *nisi prius*, court refused a new trial. *Mather v. Brinker*, 2 Wil. 243.

or for variance between issue and record;

A material witness for defendant concealed himself in the plaintiff's house to avoid being served with a subpoena; by which the plaintiff obtained a verdict, but the court set it aside without costs, it being unreasonable for the plaintiff to carry the cause down to trial when she knew the defendant could not make a defence. *Montpeffon v. Randle*, Hil. 20 Geo. 2. Bull. N. Pri. 328.

or for unfairly keeping out of the way witnesses;

If the sheriff on the execution of the writ of inquiry, admits improper evidence to be given whereby the damages are lessened, the court will set aside the inquiry.

or where sheriff admits improper evidence;

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tion, and give plaintiff leave to execute a new writ of inquiry. Bar. 448. *Tutton v. Andrews.*

or witnesses afterwards discovered incompetent;

An objection to the competency of witnesses discovered after a trial is not a sufficient ground of itself for granting a new trial, but it may have some weight with the court where the party applying appears to have merits. *Turner and another v. Pearce*, 1 D. & E. 717.

or where a system of perjury appears;

A new trial granted after a very strict scrutiny upon the ground, that the whole was a fiction supported by perjury, which defendant could not be prepared to answer; that since the trial many circumstances had been discovered to detect the iniquity, and to shew the subornation of the witnesses. *Fabrilius v. Cock*, Burr. 1772.

or any tricks used;

If a party obtain a verdict by any trick or unfair unconscionable advantage, court will grant a new trial, and even subject him to payment of costs. *Anderson v. George*, Burr. 353.

or pannel returned by improper officer;

If the under-sheriff were attorney in the cause, and returned the pannel of jurors, new trial will be granted. *Boylis v. Lucas*, Cow. 112.

or partiality avowed by jury;

A new trial was granted, because the foreman of the jury had declared, that the plaintiff should never have a verdict. Sal. 845. S. P. Sir G. Wynn v. *Bishop of Bangor*, Com. 601.

or any juror artfully personated;

A verdict was set aside because one person answered to another's name, and was sworn a juror. *Norman v. Beaumont*, Bar. 453. *Wrey v. Thorn*, Ib. 454.

or sworn after being challenged;

A juror on the principal pannel was challenged, and afterwards sworn on the tales by a wrong name; and though no fault was found with the verdict, yet the court granted a new trial. *Parker v. Thornton*, Str. 629. Raym. 1410.

or where jury drew lots;

Where the jury drew lots, verdict was set aside; though according to evidence and costs, abided the event,

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event. *Hall v. Cove*, Str. 642. *Philips v. Fowler*, Com. 525.

If it could be proved by any other than a jurymen, that a verdict was owing to chance, as by jurymen tossing up and the like, it would be set aside; but not so if the jurors voted how it ought to be, and seven were on one side and five of the other; because, in such case, nothing was determined by chance, the five jurors might ultimately be convinced by the seven: but if they only acquiesced in the finding of the verdict, that is sufficient; and they shall not afterwards be suffered to deny such acquiescence. *Lawrence v. Boswell*, Say. 100.

where verdict was the effect of chance, by jury tossing up, or the like;

Upon a motion to set aside a verdict upon the affidavit of two jurors, who swore, that the jury, being divided in their opinion, tossed up, and the plaintiff's friends won; agreeable to *Hall v. Cove*, Str. 642. Per Lord Mansfield C. J. the court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every such case the court must derive their knowledge from some other source, such as somebody having seen the transaction through a window, or the like. Rule refused. *Vase v. Delaval*, 1 D. & E. 11.

how this must be shewn.

So a mere subsequent confession of a jurymen to the defendant's attorney, that the jury drew lots which six of them should determine the verdict, no ground for a new trial. *Aylett v. Jewel*, Blac. 1299.

The courts will grant a new trial for misdirection of the judge who tried the cause in point of evidence. *New trial for misdirection of the judge;* *How v. Strobe*, 2 Wil. 273. *Russell v. Palmer*, 2 Wil. 328.

After a nonsuit by order of the judge at nisi prius, improperly, the court granted a new trial without costs. 3 Wil. 146. *Buseall v. Hogg*. *Ib.* 338. *Ruckham v. Jessup*, *Rice v. Shute*, Burr. 2612.

An

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but how far
court will ex-
ercise their dis-
cretion in this
respect.

An application for a new trial is an application to the discretion of the court, who ought to exercise that discretion in such a manner as will best answer the ends of justice.

Where a new trial therefore is moved for on the ground of a misdirection in point of law, if the court see that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the question of law. *Edmondson v. Macbell*, 2 D. & E. 4.

New trial granted, judge refusing to let defendant *executrix* give evidence generally of payment of debts, &c. on a special *plene administravit*, setting out judgment debts, and more assets than sufficient for those debts being proved in her hands. *Smedley v. Hill*, Blac. 1105.

The court will grant a new trial in a penal action, on account of a mistake or misdirection of the judge. *Wilson v. Rastal*, 4 T. R. 753.

New trial for
excessive da-
mages when
granted.

There is no doubt but that the court has the power of taking the opinion of a second jury in any case where the damages are excessive; but all such questions depend on their own circumstances, on which the court will exercise their discretion. *Ducker v. Wood*, 1 D. & E. 277.

But they will be very cautious how they overthrow verdicts.

Inquisition
when set aside
on that account.

The court will not set aside any inquisition on a writ of inquiry for excessive damages, unless the case be gross and the damages enormous, if the action be for a tort or trespass. *Bruce v. Rawlins*, 3 Wil. 63.

Excessive damages were given on a writ of inquiry for a militia-man against his colonel, who had ordered him twenty lashes; but the court would not set it aside,

because

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because the colonel had acted arbitrarily *malo animo*, and was well able to pay them. *Benson v. Sir Thomas Frederick*, Burr. 1846.

In personal *torts* the court will seldom grant a new trial for excessive damages. *Gilbert v. Burtenshaw*, Cow. 230. *Fabrigas v. Mortya*, Blac. 929.

But if the damages be outrageous they will. *Sharpe v. Brice*, Blac. 942.

They must, however, be so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury; and outrageously disproportionate either to the wrong received, or to the situation and circumstances of either the plaintiff or defendant.

Damages must be flagrantly excessive.

The court will not grant a new trial in an action for *crim. con.* merely because the damages appear excessive. *Duberly v. Gunning*, 4 T. R. 651. where the subject is fully discussed.

In an action for maliciously indicting plaintiff for perjury, 400 *l.* damages not excessive. *Ib.*

The plaintiff, a baronet and member of parliament, recovered 10,000 *l.* damages in an action on the case for a malicious prosecution, viz. indicting and trying him for felony at the Old Bailey. The court, on motion for a new trial on account of excessive damages, refused to grant it. *Sir Alexander Leith v. Pope*, Blac. 1327.

If a new trial be granted for excessive damages, and the same damages are given again, the court will never grant a third trial. *Chambers v. Robinson*, Str. 692.

If some damages given again, no third trial.

New trials refused in various actions for assaults and imprisonments, on the ground of excessive damages. *Leeman v. Allen*, 2 Wil. 160. *Huckle v. Money*, *Ib.* 205. *Beard-*

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Beardmore v. Carrington, lb. 244. *Ducker v. Wood*, 1 D. & E. 277.

So for debauching plaintiff's daughter. *Tullidge v. Wade*, 3 Wil. 18.

No new trial in tort for smallness of damages;

It is a general rule, that the court will not set aside a verdict in an action for a tort, on account of the smallness of the damages. *Mauricet v. Brecknock*, Do. 509. *Barker v. Sir Wolston Dixie*, Str. 1051.

except in certain cases.

Unless it arises from a mistake in point of law of the sheriff, as in *Markham v. Middleton*, Str. 1259.; or of the jury, as in *Woodford v. Eades*, Str. 425.

General principle respecting new trials on the ground of damages.

The principle is this, that the constitution has referred the decision of the question of damages to the jury; that the court ought not to set up their own judgment against that of the jury, especially in cases where the damages depend upon mere sentiment and opinion, and there is no rule by which they can be ascertained. It is different, indeed, where damages depend in anywise upon calculation, for the court have then some medium by which they are enabled to correct any mistake of the jury. *Dubery v. Gunning*, 4 D. & E. 658.

D.

D. Of the Costs in case of new Trial.

Of the costs in cases of new trial.

A new trial is seldom granted but upon payment of costs; but this is in the discretion of the court.

Where a plaintiff refuses to be nonsuited contrary to the opinion of the judge, a new trial (if granted) shall be without costs. So where a plaintiff submits to a nonsuit in compliance with the erroneous opinion of a judge, the nonsuit shall be set aside without costs. *Pochin v. Pawley*, Blac. 670. *Buseall v. Hogg*, 3 Wil. 146. *Rackham v. Jessup*, lb. 338.

Where a new trial has been granted, and nothing was said in the rule concerning the costs of the first, although

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though the same party succeed on the second trial, he shall not have the costs of the first. *Mason v. Skurray*, Do. 438.

So where a case is reserved, and, from the insufficient statement of it, it is necessary to send it down to a second trial, and nothing is said respecting the costs, the party succeeding on such second trial is not entitled to the costs of the first. *Hankey and others v. Smith and others*, 3 D. & E. 507.

C. How to proceed if new Trial granted.

If verdict is set aside, and new trial granted, draw up rule, serve it, and pay costs immediately, if part of the rule; if not paid, the other side may move to enter up judgment and take out execution.

How to proceed if new trial granted.

In B. R.

Nisi prius record need not be re-ingrossed if no postea indorsed; but if it is, the officer (the signer of writs) will not pass the old record again.

If a new trial be granted, the return in the jurata must be altered the same as in case of remanents, and the record must be passed again, and a new venire and distringas sued out and returned, notice of trial given, and cause again set down; but no new entries are made or paid for.

In C. B.

Nisi prius record need not be ingrossed a-new; but jurata altered as to return. If tried in same term, record need not be re-sealed, nor any new venire or habeas corpus; but otherwise, if not tried in same term. Let a new placita be added to the record of the term in which the cause is to be tried.

If after a new trial granted, plaintiff does not proceed to try it again, defendant may move for judgment, as in case of a nonsuit. *Fabrilus v. Cock*, Burr. 1771.

How if plaintiff does not proceed to second trial.

There was a verdict, and new trial granted, and then the record of *nisi prius* was made up, with an appearance and plea of a different term from the former record, and verdict again for the plaintiff, which on motion was set aside, it not being the same issue that

Same record, &c. must be carried to trial.

was

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was directed to be tried again; and though a new trial was granted, yet it ought to be upon the old plea. *Harper v. Davy*, B. R. Raym. 510. Carth. 498.

No amendment
suffered.

After a new trial granted, no amendment will be allowed in the record. *Parker v. Ansel*, Blac. 920.

Because the intent of new trials is to submit the same questions to the consideration of another jury, but by amendments the question would be varied.

Defendant, after a verdict against him, obtained a rule for a new trial, which, after argument, on a subsequent day was discharged. He then pleaded a plea *puis darrein* continuance, entitled of the term generally, and the court refused to order a special memorandum of the day when it was filed under these circumstances. *Lovell v. Eastaff*, 3 T. R. 554.

¶. Of the *Venire Facias de Novo*, and the Difference between that and Motion for new Trials.

Of the difference between motions for new trial, and *venire facias de novo*.

Care should be taken not to confound motions for a *venire facias de novo* with motions for new trials; they agree, indeed, in some things, but they differ in many: They agree in this, that in both cases a *venire facias de novo* must be awarded, and that the court may or may not grant either of them; but they differ first in this, that a *venire facias de novo* is the *antient* proceeding of the common law; a new trial is only a *new* invention. The first is as antient as the law, when attaints were in use; but motions for new trials are of modern date. The judgment in attaint being very severe, and the punishment excessive hard, to avoid that severity it was thought better to proceed in a milder way; motions, therefore, for new trials were introduced. They likewise differ in this respect, that new trials are generally granted where a general verdict is found; a *venire facias de novo* upon a special verdict. But the most material difference between them is, that a *venire facias de*
novo

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novo must be granted upon matter appearing upon the record; but a new trial may be granted upon things out of it. If the record be never so right, if the verdict appear to be contrary to the evidence given at the trial, or if it appear the judge has given wrong directions, a new trial will be granted. But it is otherwise as to a *venire facias de novo*, which can only be granted in one or other of these two cases: As, 1st, If it appear upon the face of the verdict, that the verdict is so imperfect that no judgment can be given upon it; 2dly, Where it appears that the jury ought to have found other facts differently: and it cannot be granted in any other case. 1 Wil. 55. *Witham v. Lewis*.

Again—A new trial is moved for on the part of defendant, upon the ground that justice has not been done him; a *venire de novo* is moved for on the part of plaintiff, in order to correct any error in the *possea* or verdict, when it cannot be done by amending the *possea* from the judge's notes, or the like. Such as if a general verdict be given in an action of slander, where some of the counts in the declaration are bad, and others good; there the *possea* cannot be amended and entered only on the good counts, because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them. The only remedy, therefore, in such case, is by awarding a *venire de novo*, which must be by moving the court for that purpose. *Eddowes v. Hopkins*, Do. 378.

So if final judgment has been obtained, after which it is too late to amend, in such a case, a *venire de novo* may be moved for. *Grant v. Afle*, Do. 722.

The effect of a *venire de novo* is sending the cause back to have damages assessed, only on that count on which, in point of law, he is entitled to recover. *Id.*

So where issue is joined on a matter of fact, pleaded in abatement and found for plaintiff, and jury omit assessing damages, a *venire de novo* shall be awarded; for where a man may have an attain, there no damages shall be assessed by the court, if they be not found by the

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the jury. 4 Leon. 245. Godb. 207. And, as in this case, if outrageous damages had been given, an attain would lie, a *venire de novo* must go. *Richorn v. La Maitne*, 2 Wil. 368.

In an action of debt, for a penalty on breach of articles of agreement, the jury ought, agreeable to the stat. of 8 and 9 W. 3. to assess the damages on the breach assigned; which, if not done, it is a defective verdict, as plaintiff cannot take judgment on the whole penalty, a *venire facias de novo* therefore will be awarded. *Drage v. Brand*, 2 Wil. 377.

Thus, in all cases of defective verdicts on the part of plaintiff, a *venire de novo* is moved for.

So, if a doubt arises from an ambiguous and unusual word in the verdict, the court will lean in favour of a *venire de novo*; and this the rather, because in favour of a defendant, though the verdict be full, the court may grant a new trial. A *venire de novo* awarded on the verdict, guilty of printing and publishing only. *Rex v. Woodfall*, Burr. 2669.

A court of error may award a *venire de novo*. *Grant v. Afle*, Do. 722.

SECTION III.

Of arresting the Judgment.

A. When and how to move in Arrest of Judgment.

B. Of the Nature of an Arrest of Judgment, and to what Courts and Cases it extends.

C. Of the Grounds of arresting the Judgment.

D. Of awarding a Repleader.

3.
When and how
to move in
arrest of judg-
ment.

The defendant, within the four days, has liberty to move the court in arrest of judgment.

In

Of arresting the Judgment.

In B. R. a motion in arrest of judgment may be made at any time before judgment entered up, *Taylor v. Whitehead*, Do. 745. and even after a rule for a new trial has been discharged.

But in C. B. motion in arrest of judgment must be made before or upon the appearance-day of the *habias corpora juratorum*: *Lyle v. Rivers*, Bar. 445.

And if it is moved on the last day of term, notice of the motion must be given, and an affidavit of service of notice, or court will not grant the usual rule to stay judgment. *Camp v. Gale*, Bar. 247.

But otherwise, in common cases no notice is necessary in either court, nor affidavit, to ground motion on; but a rule must be obtained to bring the *posita* or inquisition into court, which must be marked by clerk of papers in K. B. and secondary in C. B. It is a motion of course, and rule got at clerk of rules office in B. R. or secondary's in C. B.

Or if inquisition be still in sheriff's hands, give him notice to produce it, and make affidavit of service of notice.

The purport of the rule of court is, that the entry of the final judgment be stayed until the court be moved on behalf of plaintiff, and shall otherwise order; notice of the rule is to be given to plaintiff, his attorney, or agent. Plaintiff afterwards gives notice, in usual way, to defendant's attorney when he means to move the court to discharge the rule. He serves copy of notice, and makes affidavit thereof.

If afterwards the rule is discharged, he then draws up the rule, serves copy on defendant's attorney, and proceeds to tax costs.

But if judgment be arrested, defendant's attorney then draws up rule, and serves copy on plaintiff's attorney, and each party pays his own costs. *Cow.* 407.

M m

Defendant

Of arresting the Judgment.

Defendant had moved in arrest of judgment, and obtained the common rule, which is, that the entry of judgment be stayed till the court be moved on behalf of the plaintiff, and shall otherwise order; of which motion defendant had notice. Counsel for plaintiff admitted the objection in point of law, and prayed that an entry be made on the roll, as the adjudication of the court, that judgment be arrested, which was ordered. For till this entry be made, the plaintiff can neither bring error, nor maintain a new action, as the rule leaves the action pending pleadable in bar to a new action. *Bulling v. Rogers*, Bar. 278.

B. Of the Nature of an Arrest of Judgment, and to what Courts and Cases it extends.

Causes of arresting judgment must be on the face of record;

Arrests of judgment arise from intrinsic causes appearing upon the face of the record; for a judgment can never be arrested, but for that which appears upon the face of the record itself. *Packey v. Harriſon*, Raym.

232.

For if record be only deficient, error must be brought, and diminution alleged.

Thus, if an infant brings an action by guardian, and no warrant for him to appear by guardian is entered on record, judgment will not be arrested; but error must be brought, and diminution alleged and certified, and judgment will be reversed. *Id.*

How far power of inferior courts in this respect.

An inferior court may set aside an interlocutory judgment, in two cases; viz. For irregularity, and to let in a trial of the merits, even though the judgment were regular.

So they may set aside a verdict for irregularity, but they are not trusted with a power to set aside verdict upon the merits. *Rex v. Peters*, Burr. 572.

No arresting judgment after judgment on demurrer; otherwise, after judgment by default.

After judgment on demurrer, there can be no motion to arrest the judgment, as the court will not suffer any one to tell them that the judgment they gave, or otherwise, after mature deliberation, is wrong. But otherwise, in case of judgment by default; for that is not given in so formal a manner.

Of arresting the Judgment.

lemn a manner; or, if the fault arises on the writ of inquiry, or verdict, for there the party cannot allege it before. *Edwards and Blunt*, Str. 425.

When a conviction is removed by *certiorari*, no notice can be made in arrest of judgment, unless the defendant be personally present. *The King v. Spragg*, Blac. 209.

How on convictions.

C. Of the Grounds of arresting the Judgment.

C.

It is a general and invariable rule, with regard to arrests of judgment upon matter of law, "that whatever is alleged in arrest of judgment, must be such matter as would, upon demurrer, have been sufficient to overturn the action or plea." But this rule will not hold *à converso*; viz. That every thing that may be alleged as cause of demurrer, will be good in arrest of judgment; because now, many omissions and defects, if not taken advantage of in time, are cured by the statutes of jeofails, or by a verdict.

Cause of arresting judgment must be good ground of demurrer, but not *à converso*;

Thus, after a verdict where defendant's name was put in the count instead of plaintiff's, judgment will not be arrested; because, by stat. 16 and 17 Car. 2. c. 8. judgment shall not be stayed after a verdict, by reason of mistaking the name of plaintiff or defendant in pleading. *Richards v. Simonds*, Blac. 40.

for many defects are cured by statutes of jeofails.

So where issue was local, and not tried in right place; *Maitland v. Taylor*, Ld. Raym. 1212.; or an issue is misjoined, Str. 641. *Harvey v. Peake*, Burr. 1793.

But if there be no issue at all, as where *similiter* was wanted, it is bad. *Cooper v. Spencer*, Str. 641.

But record may be amended and *similiter* added.

The statutes of jeofails relating to cases after verdicts are, 32 Hen. 8. c. 30. 18 Eliz. c. 14. 21 Jac. 1. c. 13. and 16 Car. 2. c. 8.; which last has been called the Omnipotent Act from its extensive operation, and the

Of arresting the Judgment.

Student may there find the various defects and omissions a verdict cures.

also by a verdict.

So omissions are often cured by the verdict itself.

In what cases the court will arrest judgment after verdict.

The court are extremely cautious how they arrest the judgment after verdict. They will not intend any thing to overturn it: they will over-rule objections, which they would have listened to on demurrer. *Weston v. Mann*, Burr. 1725.

Every thing necessary supposed to be proved;

They will even suppose every thing proved at the trial which was necessary to be proved unless the contrary could be made to appear on the record. *Bull v. Steward*, 1 Wil. 255.

though omitted to be stated on the record.

Thus if a declaration or plea omits to state some particular circumstance, without proving of which at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict; as if in an action of trespass the declaration doth not allege, that the trespass was committed on any certain day; or if the defendant justifies by prescribing for a right of common for his cattle, and does not plead that his cattle were levant and couchant on the land. Though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission in due time, but takes issue and has a verdict against him, these exceptions cannot after verdict be moved in arrest of judgment; for the verdict ascertains those facts which before, from the inaccuracy of the pleadings, might be dubious; since the law will not suppose that a jury under the inspection of a judge, would find a verdict for the plaintiff or defendant unless he had proved those circumstances, without which his general allegation is defective. *Blac. Com.* 394.

So in ejectment, though declaration does not state in what vill lands lie; but afterwards says that defendant, at B. aforesaid, ejected him, &c., it shall be intended after verdict, that the lands lay at B. *Goodright v. Stratther*, *Blac.* 706.

Thus

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Thus a verdict will cure a title defectively set forth; but it will not cure a defective title. *English v. Burnell*, 2 Wil. 261. Thus a title,

The rule is this, where the plaintiff has stated his title or ground of action defectively or inaccurately, since to entitle him to recover all circumstances necessary in form or substance to complete the title so imperfectly stated, must be proved at the trial; it is a fair presumption after a verdict, that they were proved: but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial; and therefore there is no room for presumption. *Rushton v. Aspinale*, Do. 683. if defectively set forth, is cured, but not a defective title.

We find, therefore, that exceptions moved in arrest of judgment must be much more material and glaring than such as will maintain a demurrer, or, in other words, that many inaccuracies and omissions, which would be fatal if early observed, are cured by a subsequent verdict, and not suffered in the last stage of a cause to unravel the whole proceedings. 3 Blac. Com. 394. Causes, therefore must be stronger than mere causes of demurrer.

But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself. *English v. Burnell*, 2 Wil. 258. Sal. 365.; or if the action be brought by plaintiffs who from the face of the record cannot in law maintain it; as where trespass was brought by A. and B. for breaking the house of A. and taking the goods of A. and B. *Maddox and another v. Taylor*, Raym. 1382.; or where plaintiff declared as administrator of an executor when administration *de bonis non* ought to have been taken out. *Bastard v. Jutsham*, Bar. 444.; or if defendants in the action be such against whom the action cannot be maintained, as where one obligor only was sued on a joint bond, and it appeared such in declaration. *Horner v. Moor*, Burr. 2614. But for manifest defects on the face of the record, judgment will be arrested; as if plaintiff be such as cannot maintain the action; or defendant such as cannot be sued.

In all such cases judgment must be arrested.

Of arresting the Judgment.

So in trespass for taking divers goods, not saying what goods; after verdict and damages for plaintiff, judgment was arrested. *Wyat v. Effington*, Raym. 1410. Str. 637.

If different causes of action which cannot be joined.

Arrest of judgment, if there should be in the declaration different causes of action which cannot be joined, or plaintiff should sue in different capacities himself, or against defendant in different rights.

The general rule is, where the same plea and the same judgment will do for all the counts, they may be joined. *Mast v. Goodsen*, 3 Wil. 352. *Brown v. Dixon*, 1 D. & E. 276.

Where there are two counts, and the supposed cause of action in one of them not actionable, and entire damages are given, the court cannot pronounce judgment on the record, but on motion it will be arrested: as in slander, if on a general verdict, the words in any one count are not actionable. *Onslow v. Horne*, 3 Wil. 185.

Plaintiff should be careful how he records a general verdict with entire damages; why.

It is of great consequence to plaintiff to take care what verdict he takes if there be any count in his declaration doubtful in point of law, since the jury may assess entire or distinct damages on all the counts; if the former, and any one is bad, judgment will be arrested; but if the latter, judgment may be given upon any good count. *Onslow v. Horne*, 3 Wil. 185.

If damages assessed severally, not such danger.

Where one count appears bad, and the verdict is entered generally on all the counts, the court must reverse the judgment *in toto*, since they cannot see on which of the counts the damages were given: But not so if the damages were assessed severally; so that where the plaintiff who were assignees of A. and B. two bankrupts under separate commissions, brought an action against defendant for a joint debt due from him to both the bankrupts, and for separate debts due to each, and having obtained a verdict not in a gross sum, but the damages assessed severally upon the respective counts; the court afterwards, on motion in arrest of judgment, arrested the judgment on the counts for the separate debts

Of arresting the Judgment.

debts due to each bankrupt, but suffered plaintiff to enter it up on the counts for the joint debts. *Hancock and others, Assignees, &c. v. Haywood*, 3 D. & E. 434.

If plaintiff take a verdict on one particular count, and that count afterwards proves a bad one, he cannot resort to another, but must be bound by his election, and judgment will be arrested. *Holloway v. Bennet*, 3 D. & E. 448.

How if he elects a count, and that is bad.

So judgment will be arrested, if it appears that there was no writ or process to give the court jurisdiction, but proceedings have been carried on by consent.

If cause brought on by consent;

The plaintiff's goods distrained were not replevied, but, by consent of the attornies on both sides, remained in the distrainer's hands, and without any writ of *re. fa. lo.* or appearance in this court, plaintiff declared; defendants avowed: and after long special pleadings, and after trial of the issues at the assizes, and a verdict for plaintiff, the avowants moved to set aside all the proceedings, and the rule for that purpose was made absolute; the court held the agreement to be void; a fraud upon the revenue and officers, and an abuse of the court and the bar, that they had no jurisdiction, and consequently could not give judgment. *Richardson v. Frank*, Bar. 451.

without process, &c. court will afterwards arrest judgment.

Or if plea in abatement not entered on the roll.

If on a plea in abatement, a *respondeas ouster* is awarded, and afterwards defendant pleads in chief, and there is a verdict for plaintiff; yet if the plea in abatement does not appear to have been entered on the *nisi prius* record, judgment will be arrested; for, if being entered on the plea roll (which was in court) it must be mentioned in the *nisi prius* roll, otherwise it does not appear that it was a verdict in the same cause. *Carth.* 447. 5 Mod. 399. *Raym.* 329.

So if there was a plea in abatement, and it is not entered on record.

Thus we have endeavoured to shew the lengths which the courts will go to support a verdict, and the necessity they are under in certain cases of arresting the judgment.

The above cases are after verdict.

Of arresting the Judgment.

Of arresting judgment after judgment by default.

After judgments by default, court not so strict in arresting judgment;

It may be proper here to observe, that this anxiety of the courts only extends to judgments after verdicts, and not to judgments by default. Whenever, therefore, a motion is made to set aside an inquisition, the court will not intend any thing in support thereof. But the objection is considered as coming before the court exactly as if it were upon demurrer, and not like the cases of objections to judgments after verdict. For *per* Lord Mansfield the true distinction as to supplying such defects is, whether the objection be made after a verdict or not. *Collins v. Gibbs*, Burr. 899.

though to such cases statutes of jeofails are extended.

With respect, however, to all such omissions or defects as are cured by the different statutes of jeofails after verdicts, they are also equally cured by judgments of confession or default; provided there be an original writ or bill, and warrant of attorney duly filed. 4 & 5 Ann. c. 16. s. 2.

Where defendant means to arrest judgment for default in declaration, he should not attend inquiry.

If defendant wishes to take advantage of any fatal mistake in declaration by moving in arrest of judgment, he must not, after having suffered judgment by default, attend the execution of writ of inquiry, and cross examine plaintiff's witnesses, or the like, but he must rely on the mistake. *Freeland v. Hunt*, 2 Wil. 380.

How he ought to move.

If he does rely on the mistake, he may afterwards move, that interlocutory judgment be forthwith entered upon record, agreeable to the declaration delivered, and the roll be brought into the proper office; and that defendant may have four days to move in arrest of judgment after roll is brought in. *Id.*

In trespass, where one let judgment go by default, and the other justified, and on trial was acquitted, and damages were assessed against the defendant by default, judgment was arrested.

Trespass against two; A. let judgment go by default; B. justified, and on trial had a verdict; but damages were assessed against A. at the trial. On motion, in arrest of judgment, it was insisted, the rule ought to be discharged, because a tort differs from a contract; for in covenant against two, if one pleads a plea that goes to the whole, and on issue joined it be found for him; and the other lets interlocutory judgment go by default; the plaintiff cannot have final judgment against him, according to 1 Lev. 63. But says that case, in trespass one

Of arresting the Judgment.

one defendant may be guilty, and the other not: But held, that if in a plea personal against divers, one pleads in bar to parcel, or which extends only to him that pleads it; and the other pleads a plea that goes to the whole; the last shall be tried first, because it goes to the whole, and the other shall have the advantage of it; for in personal actions, the discharge of one is the discharge of both; and no judgment can be given against the other defendant, because it appears the plaintiff had no cause of action. Judgment arrested. *Biggs v. Ben-
gor*, Raym. 1372.

In trespass against two, there was judgment by default; and on the inquiry, separate damages were assessed, 20*l.* against one, and one penny against the other; and judgment was arrested, as damages cannot be severed where the trespass is confessed, as by letting judgment go by default. *Onslow v. Orchard*, Str. 422.

So where separate damages were assessed on inquiry.

D. Of awarding a Repleader.

If by any mistake or inadvertence in the pleadings, the issue be joined on a fact totally immaterial or insufficient to determine the right, so that the court upon the finding cannot know for whom the judgment ought to be given; as if in an action on the case in *assumpsit* against an executor as executor, he pleads that he himself (instead of the testator) made no such promise; 2 Vent. 196. or if in action of debt on bond conditioned to pay money on or before a certain day, the defendant pleads payment on the day; which issue, if found for the plaintiff, would be inconclusive, as the money might have been paid before; *Tryon v. Carter*, Str. 994., and the like. In these cases the court will, after a verdict, award a repleader. "Quia videtur curia quod placitum prædictum et exitum superinde junctum est minus sufficiens in lege, ideo dictum est partibus quod replacitent."

A repleader, what.

But if it appears from the whole record, that nothing material can possibly be pleaded in any shape whatever, and that a repleader would be fruitless, it will not be awarded. *Re v. Philips*, Burr. 301.

Of arresting the Judgment.

The consequence of a repleader, &c.

Whenever a repleader is granted, the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, or rejoinder, wherein there appears to have been the first defect or deviation from the regular course. 3 Blac. Com. 395. For further information on this subject, see 4 Bac. Abridg. 127. and Comyns' Abridg. title Pleader, R. 18.

SECTION IV.

Of taxing Costs and signing final Judgment.

Rule for judgment having been given,

how to tax costs.

We have already shewn, in the first section of this chapter, how to give rule for judgment on the *posse* or inquisition, and at the expiration thereof, to carry the same, with the necessary papers, to the master in B. R. and prothonotary in C. B. to get the costs taxed, and final judgment signed thereon.

Of the attendance of the parties.

Of taking out rule to attend taxation.

When and how rule to be served.

Of the notice of taxation, to be given in consequence thereof.

Of the affidavit for allowance of extra expences.

If the party, against whom a verdict is obtained by trial or inquiry, has a mind to be present on taxing costs, and distrusts the attorney on the other side, fearful lest he should not give notice thereof, which it is usual for fair practitioners to do, let him get rule from clerk of rules in B. R. or secondary in C. B. to be present at taxing costs; pay 4s. It must be served on the attorney of the other side, and should be taken out and served before time for signing judgment is out, or execution may issue against the party. If final judgment is not signed, and party takes out and serves rule to be present, &c. after rule for judgment is out, the attorney is not obliged to give him more than a few hours notice of taxing costs; but if taken out, and served before rule for judgment is expired, attorney on the other side must give twenty-four hours notice when he intends to tax costs.

If, upon the taxation of costs, you would wish to be allowed any extra expences, you must make an affidavit of the facts, stating the distances the witnesses came, the

Of taxing Costs and signing final Judgment.

the charges you were put to, and the particular circumstances.

In country causes, such affidavit is generally made, and sent up to the attorney in London, who must carry same to clerk of rules in B. R. and secondary in C. B. and file them there, and pay him 8 *d.* per sheet for a copy to be made out for the master. Amongst fair practisers also, a copy is sent to the opposite attorney; for which pay 4 *d.* per sheet.

How made in country causes.

When costs are taxed, which are called costs *de incremento*, final judgment is then said to be signed upon the *poslea* or inquisition, and execution may be sued out.

Taxed costs are costs *de incremento*. Final judgment is now said to be signed.

SECTION V.

Of docketing Entries and Judgments.

But it is further necessary to enter the judgment and docket the same; which is done, by carrying the *poslea* or inquisition, with the master's *allocatur* thereon; to Westminster to the treasury, and leaving it there. The clerk enters the judgment thereon; pay 2 *s.* for *poslea*; 1 *s.* 6 *d.* for inquiry. This, however, is upon the supposition that the roll has been already carried in after issue was joined, and before trial, in manner as shewn in the first section of the ninth chapter; for if not, it must be now carried in and filed, as of the term issue was joined, and the judgment entered thereon and docketed.

Of docketing the judgment.

How to be done.

If plaintiff has obtained judgment otherwise than by verdict, as by default, or confession upon a suit by original, his attorney ought to make out a *præcipe* for an original, returnable on the first return of that term in which judgment is, (whether it be final or interlocutory judgment, in case of actions sounding in damages,) to warrant the judgment, in case a writ of error should be brought; which *præcipe* must be carried to

How original to be obtained, in case of judgment by default by original, in order to prevent error.

Of docketing Entries and Judgments.

to the curfitor of the county where the action is laid, on or before the effoin-day of the subsequent term; otherwise, by an order in Chancery, he cannot make out an original writ of a return past after that time, without special warrant from the Lord Chancellor, Lord Keeper, or Master of the Rolls. *Vide* Lord Clarendon's Orders in Chancery.

Which original is to be returned and filed.

The original writ in such case being made out, the plaintiff's attorney returns it of course, and then files it with the *custos brevium*; and he must also file a warrant of attorney, both for himself and for defendant, if he appeared by attorney. This is necessary to prevent writ of error. See 4 and 5 Ann. c. 12. s. 2.

Of the entry-roll, and docketing same:

Whenever issue is joined between the parties, an entry of all the pleadings should then regularly be made upon a roll, which should be carried in and filed of that term in which issue is so joined.

Often neglected till after judgment;

This, however, is for the most part now neglected to be done; and the attorney for the plaintiff proceeds on to trial, postponing the entry of his pleadings till after he has obtained judgment, and often to a much later period, when he enters and docket all the pleadings and judgments in various causes, in which he may for some time past have been concerned.

unless he is compelled to enter issue.

It often happens indeed, as may be seen *ante*, chap. 9. sect. 1. that the plaintiff is obliged to make this entry by a rule to enter the issue, and if not so compelled, it is always advisable to carry in the roll, and docket the same, soon after judgment is obtained.

The way to proceed is as follows:

In B. R.

How to proceed in carrying in rolls and docketing entries.

Get roll from the clerk appointed* to deliver out rolls, now Mr. Adams of Lincoln's Inn,

In C. B.

Get a roll from the prothonotary's office, of the term in which the issue is joined; make out

* No rolls to be received or allowed for by the clerk of the treasury, unless marked by the person appointed by the chief justice to deliver out rolls. Trin. 12 Geo. 2. 1738.

Of docketing Entries and Judgments.

Inn, stationer, who stamps it about the middle. A little below this you begin your entry; first, the term in which issue was joined.

Hitherto of the term of 34 Geo. 3. 1794.

Witness, Lloyd Lord Kenyon. Then enter warrants of attorney*. London, ss. A. B. puts in his place Thomas Smith his attorney, against C. D. in a plea of trespass on the case (or of debt, or as the case may be).

London, ss. The said C. D. puts in his place Joseph Allen his attorney, at the suit of the said A. B. in the plea aforesaid.

Then go on with the memorandum and copy of the issue, thus:

London, ss. Be it remembered, that (here enter the whole issue thereon).

Having thus completed the entry of the issue, the roll is ready to be carried in.

But, for the better finding of the roll when carried in, a docket must be made, and left with the clerk of the judgments, who enters the same in alphabetical order, by the defendant's surname, in a book kept by him for that purpose.

But

out the warrants of attorney of the same term, on a plain piece of parchment, thus: In the Common Pleas, Michaelmas term, in the 34th year of the reign of George the Third.

Middlesex, to wit. Richard Fenn puts in his place T. S. his attorney, against John Denn, late of, &c. yeoman, in a plea of trespass on the case.

Middlesex, to wit. The said John Denn puts in his place J. A. his attorney, at the suit of the said Richard, in the plea aforesaid.

Take it to the warrant of attorney office and file it, pay 8d. in debt, case 1s. 4d.; then take the roll to the prothonotary's, with the entries thereon complete, if you have signed final judgment; if not, as far as you have gone in the cause: If the entry of the issue or demurrer be paid for before, you pay nothing, if not, 8d. per sheet; then the clerk will give you the docket roll to enter the causes; if the action be in trespass, the prothonotary's clerk pays for bringing in the roll 4d. per sheet.

The form of the docket is as in B. R.

* Warrants of attorney to be entered on the roll at the beginning of the cause, otherwise the roll not to be received or filed. R. E. 4. Jac. 2. They are supposed to be filed at the commencement of the action. 1 Ld. Raym. 509.

Of docketing Entries and Judgments.

But before you make out the docket, you must get a number for your roll (or if more rolls than one, numbers for each). This number, if you apply for it of the same term in which your issue is entered, may be had of the clerk of the judgments, King's Bench office; but if your issue is of a preceding term, then you get it from the nisi prius office, for which you pay 4 s. 8 d.; you then make out your docket paper, and carry the roll to the clerk of the judgments, and he enters it. The docket is merely a slip of paper, on which is written a minute of the issue or judgment, as thus:

The entry of Thomas Smith gentleman, of Hilary term, 34 Geo. 2. Middlesex. Issue joined in debt, between A. B. plaintiff, and C. D. defendant, on a plea of nil debet. Roll 485.

Or if on judgment by default, Norfolk. Judgment by default, in case between A. B. plaintiff, and C. D. defendant. Roll 486.

Or, London. Judgment by nil dicit, between A. B. plaintiff, and C. D. defendant, for 100 l. debt, and 63 s. damages. Roll 487.

Varying the docket as the case is, and if more entries than one to be made, having got numbers for the rolls accordingly, make out docket of them all on one paper.

Take docket paper with the roll to clerk of judgments, who will

Of docketing Entries and Judgments.

will mark roll, to whom you pay 3s. for docketing; then carry roll to the clerk of the treasury, who will file same in treasury.

If the roll be not carried in and filed at of the term issue is joined, then you will have to pay a post terminum 4s. 8d. and 1s. more for the docket.

If this be done at proper time before trial, there is nothing to do after judgment, but to carry postea or inquisition, with master's allocatur, to the treasury, and leave it there for clerk to enter judgment thereon.

Attornies shall bring in the rolls of every Trinity, Michaelmas, and Hilary terms, and file the same before the effoin-day of the subsequent term, and the rolls of Easter before the first day of Trinity term following. Mich. 5 Anne.

But the custos brevium, in indulgence of the clerk, attends the day but one before every term to receive and file the rolls. He used formerly to attend the day before Trinity term for that purpose; but now he attends the day but one before Trinity.

But clerk will charge you a post diem one day before the term begins, if your roll be not filed in time.

The several and respective officers of this court shall deliver in all their rolls of Trinity, Michaelmas, and Hilary terms to the clerk of the effoins, before the effoin-day of the several terms following, and their rolls of Easter upon or before the first day of Trinity following; and the officer who shall not bring in or send all his rolls of the several terms at these times, shall pay to the clerk of the effoins 12d. for every roll brought in after.

Plea-rolls are to be brought in in three weeks after the end of the term following, or if after, 12d. to be paid. Pasch. 5 W. & M.

On motion, a new roll was ordered to be filed, the former being lost; for there being a docket of it made before it was lost, it could be no deceit on purchasers. *Evans v. Thomas*, Str. 833.

New roll ordered, old one being lost.

Of docketing Entries and Judgments.

How to be ingrossed.

All issues and judgments ought to be entered on the rolls, in a fair hand, with a large margin of an inch at least, and a convenient space left at the top (about ten inches) for binding up the same, and like space at the bottom, that the writing be not rubbed out.

The issues may be entered on both sides the roll, but should not come too near the bottom, where the roll must be numbered, &c.

Judgment-roll to be filed in treasury.

When the judgment roll is made out, the same ought to be filed in the treasury of the court.

Form of rule for new roll.

A neglect of entering judgment, and a loss of the roll, having been sufficiently shewn to the court, a rule was made, "That the clerk of the judgments shall sign a new roll, whereon is entered the judgment signed in this cause, in Michaelmas term, 1729; and that the same be numbered as roll 256, and filed amongst the rolls of that term, a special entry being first made, expressing the day of docketing the same." And it is further ordered, "That this judgment shall not be made use of against the administrator of the defendant."

Chief clerk responsible if judgment not entered after he has been paid for same.

Note. Lord Mansfield intimated, that it very much concerned the chief clerk to take care that judgments be actually entered up upon the roll in due time, and docketed; for that after he has received his fees for making such entry, he would be liable to an action upon the case, to be brought by a purchaser who should have become liable to it, and had searched the roll without finding it entered up. And he said, that the attorney who had undertaken to do this, and neglected it, would be liable indeed to the chief clerk; but still the chief clerk would be liable to the purchaser who had suffered by this neglect. *Douglas v. Yallop*, Burr. 722.

N. B. The present course is for the attorney for the plaintiff to undertake to make this entry upon the roll: for doing which the chief clerk (who is entitled to 8d. per sheet) allows him 5d. per sheet: so that the attorney in this case acts as one of the clerks of the chief clerk, which would render the chief clerk liable to the party's

Of docketing Entries and Judgments.

party's action, though the attorney would be answerable over to him; (in fact the attorneys are very apt to be negligent in bringing in these entry-rolls.)

The statute 4 & 5 W. and M. c. 20. intituled, "An act for the better discovery of judgments in the courts of King's Bench, Common Pleas, and Exchequer at Westminster," provides first, in what manner and at what time judgments shall be docketed by the respective officers in books for that purpose, that the same may be searched for by any one paying for the same; and upon neglect of the officers in such case, gives the penalty of 100 l., half to the party grieved, and the other half to any one who shall sue for the same, &c.

By statute of 4 and 5 W. & M. no judgment not docketed shall affect purchasers, &c.

And by sec. 3. "No judgment not docketed and entered in the books as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, and administrators in their administration of their ancestors' testators, or intestates estates."

N. B. This only relates to freehold lands.

And by sec. 4. gives the clerks of the judgments four-pence over and above their usual fees, for their trouble.

If defendant has a freehold or leasehold estate in Middlesex or York, you may register the judgment, which will affect them from the day of registering. For the mode of registering see note *infra*.

Of registering judgments in Middlesex and York.

Judgment

A memorial to be registered pursuant to the statute, &c.

Form of memorial.

Of a judgment in his Majesty's court of King's Bench of Trinity term, in the 34th year of the reign of King George the Third, between John Cox plaintiff, and Richard Fenn defendant, in a plea of debt for 1000 l. and 63 s. damages. Roll 50.

I do hereby certify, that judgment was signed in the above cause the 19th day of June 1794.

Edward Benton.

W. H. clerk to J. S. of, &c. gentleman, maketh oath, and saith, that he was present, and did see Edward Benton Esquire, secondary of the court of King's Bench, sign the certificate of the judgment in the memorial above mentioned.

Ingress this memorial and certificate on a piece of parchment with a treble 6d stamp thereon, carry it to the master of the King's Bench office, and he will, on seeing your postea, inquisition, or judgment-paper, subscribe the certificate; swear the affidavit before a master in Chancery, or a judge of the court where the judgment was obtained; and

N n

when

Of docketing Entries and Judgments.

Motion to set aside the docket of a judgment as void by 4 and 5 W. & M. denied, there appearing no fraud, but that the roll was accidentally mislaid.

Judgment was signed in Hilary 1733, but by omission of plaintiff's agent, the roll was not docketed and carried in till June 1737, and the true day of docketing was marked upon the docket by the clerk of the essoins. M. who pretended to be a purchaser of defendant's estate for valuable consideration in January 1736, without notice of this judgment, moved and had a rule to shew cause why the docket should not be set aside as void by the stat. 4 and 5 W. & M. On shewing cause it appeared, that the judgment was for a *bona fide* debt; that the roll was accidentally lost, and omitted to be carried in; but the true time of docketing appeared to be fairly entered without fraud; and an *elegit* upon this judgment, appeared to be executed 1735, and that M. had notice thereof, who seemed upon the affidavits to be a colourable purchaser to assist defendant. *Per Cur.* the true time of docketing not being concealed, and no fraud appearing on part of the plaintiff, we will interpose; M. may bring his ejectment and take what advantage he can. It appeared that M. had not made search for judgments against defendant till after his purchase. Rule discharged. Bar. 261. *Wait v. Garth.*

Judgment by confession upon a warrant of attorney may be entered in vacation as of the term precedent, though defendant died in vacation.

Defendant gave a warrant of attorney to confess judgment, and died within a year after, in time of vacation, before the essoin day of the subsequent term, which was Easter. The attorney, after his death, entered up the judgment as of the precedent term, Hilary, but did not bring in the roll before the essoin day of Easter term; and, on motion to set it aside, the court held the judgment to be regularly signed as of the precedent term, as the party died in the vacation, and it was a good judgment of such precedent term, though it would not affect purchasers, but from the time of signing; but as the roll was not brought in and docketed before the essoin day of the subsequent term, it was irregular. For *per Cur.* by the course and practice of the court, all the rolls of Hilary ought to be brought

But roll ought to be brought in before essoin day of subsequent term.

when done, file it with the register in Bell-yard, pay the master 1s., oath 1s., and 5s. filing.

N. B. The clerk of the dockets may certify in the absence of the master, or his deputy.

in

Of docketing Entries and Judgments.

in before the effoin day of Easter term, and made part of the bundle of Hilary; and it is for this reason that what is done in vacation is looked upon as the act of the term preceding; and there cannot be a *post terminum* roll received without leave upon motion, which the court does not grant, but when it appears that no one will be prejudiced: for if this were to be allowed, the statute of frauds, and the statute of King William for docketing judgments, would be frustrated; and therefore they disallowed the filing it. *Odes and Woodward, Sal. 87.*

Post terminum roll cannot be filed without leave of court.

CHAPTER XII.

Of Execution.

A. The Nature and different Kinds of Execution.

B. When, by whom, and against whom to be sued out, and herein of joint and several Executions.

C. Into what Places Execution may go, and herein of the *testatum* Writs.

D. Of the *Teste* and Return of the Writs of Execution, and of amending the same.

E. Of the Mode of executing the several Writs of *Ca. sa. Fi. fa.* and *Elegit*.

F. Of the Lien for Rent on Goods taken in Execution.

G. Of issuing a second Writ of Execution.

H. Of the Sheriff's Poundage, Fees, &c.

I. Of superseding Execution by Writ of Error, or otherwise.

K. Of entering Satisfaction on the Roll.

A. Of the Nature and different Kinds of Execution.

Execution,
what.

IF the regular judgment of the court after the decision of the suit be not suspended, superseded, or reversed, the next and last step is, the *execution* of that judgment, or putting the sentence of the law in force. This, indeed, is the grand object of the suit.

Executio est fructus et finis legis ;

Prosecutio legis est gravis vexatio ;

Executio legis coronat opus.

Co. Lit. 289.

Hence execution is sometimes emphatically called the *life* of the law.

Execution

Execution of a judgment is enforced by the party who has obtained the judgment suing out a certain writ, founded upon and suitable to the action in which the judgment has been given, and directed to the sheriff of the proper county, which writ is supposed to be granted at the request of the party entitled thereto, for the purpose of affording him satisfaction of the judgment so obtained by him.

How enforced.

Writs of execution, therefore, differ according to the nature of the action, namely, whether it be *real*, *mixed*, or *personal*. But as this volume of Practice has been merely confined to the prosecuting of suits in *personal* actions, we shall at present treat only of the execution of judgments obtained in such suits.

Different writs.

There are three sorts of execution generally in use for obtaining satisfaction of judgments in personal actions, either of which the party at his election may adopt, but he cannot pursue two sorts at one and the same time.

Three sorts of persecution in personal actions.

The highest of these is a *capias ad satisfaciendum*, the second an *elegit*, and the third a *feri facias*; the first being against the person of the defendant, the second against his goods and lands, the third against his goods only.

The *capias ad satisfaciendum* is a writ directed to the sheriff, commanding him to apprehend the defendant, and by virtue thereof he is deprived of his liberty, till he makes the satisfaction awarded; For neither the sheriff, nor court, can admit him to bail; and, therefore, when he is once in custody upon this writ, no other sort of execution can be sued by the plaintiff against his property; for the maxim of law is, *corpus humanum non recipit assimationem*. But if he should happen to die, while charged in execution upon this writ, the plaintiff may, by the 21 Jac. 1. c. 24. after his death sue out other execution against his lands, goods, or chattels, at his election.

Of the *capias ad satisfaciendum*.

A *capias ad satisfaciendum*, by the common law, lay only in trespasses *vi et armis*, being a direct and wilful wrong, and wherein the *capias ad respondendum* was the

immediate.

immediate process upon the original writ. But several statutes having given the process of *capias ad respondendum*, as the meane process upon the original writ in other personal actions, than those committed *vi et armis*, the *capias ad satisfaciendum* has become an executory process in them also, it being held as a rule, that where a *capias* lies in process before judgment, it will lie in execution upon the judgment itself. So in all actions by bill in B. R. a *capias ad satisfaciendum* lies in execution by the course of the court; for the bill, and its subsequent process, the *latitat* and *capias*, are, in their nature and consequence, of the force, validity, and effect of a *capias ad respondendum*.

Of the *elegit*.

The *elegit*, so called because it is in the election of the plaintiff to sue it out or not, was given as process of execution by the statute Westminster the second, c. 18. By this writ the sheriff is commanded to take and deliver to the plaintiff the defendant's goods and chattels upon reasonable appraisement and price (except his oxen and beasts of the plough); and if his goods and chattels are not sufficient to satisfy the debt or damages awarded, then the moiety of his lands and tenements, which he had at the time of the judgment given, is also to be delivered, until out of the rents, issues, and profits thereof, the debts and damages are levied, or till the defendant's term therein be expired, as if he be only tenant for life, or in tail.

Of the *fieri facias*.

The *fieri facias*, which is an old common law process of execution, is also a writ directed to the sheriff, commanding him, that he cause to be made of the goods and chattels of the defendant, the debt or damages recovered, and give the amount thereof to the plaintiff. This writ, and another writ called a *levari facias*, which commanded the sheriff to levy or make of the lands (i. e. of the issues, rents, and profits thereof) and chattels of the defendant, the sum recovered, were the only common law process of execution. But when the stat. Westm. 2. gave the *elegit*, the *levari facias* fell into disuse, and was seldom sued out, unless against ecclesiastics, after return made by the sheriff, that the defendant was *clericus beneficiatus, nullum habens laicum feodum*; and then it was directed to the ordinary or bishop, who thereupon sent forth a sequestration of the profits of the

the clerk's benefice, directed to the church-wardens, &c. to gather up the same, and pay them over to him that had the judgment till the debt was paid. But the general mode now is to sue out a *feri facias*, or *bonis ecclesiasticis*, which is sent to the register of the diocese, who will make out a sequestration, the plaintiff first giving security by bond to the bishop.

All the above writs may also be sued out as process of execution for costs obtained by the defendant against the plaintiff, if he is nonsuited, nonprossed, &c.

These writs lay for costs of nonsuit, &c.

These writs specify the nature of the action, and the judgment recovered; and differ in the return of them, as the action may be, by *bill* or *original*. For all of which forms, see the Books of Entries. The forms of them are printed with blanks, and *ca. fa.'s* and *fi. fa.'s* may be had at the stationers, neither of which need be signed, but they must be sealed.

§. When, by whom, and against whom Execution ought to issue; and herein of joint and several Executions.

Execution ought to be sued out within a year and a day after the judgment, to be computed from the time of signing the judgment. *Sympson v. Fray*, Bar. 197.

When execution should issue.

The year to be reckoned by calendar months, and not by the terms. *Winter v. Lightbound*, Str. 301.

How the time to be reckoned.

Formerly no delay was allowed, though execution was stayed by injunction out of Chancery. *Ib.* Or by any written agreement between the parties. *Thomson v. Bristow*, Bar. 205.

Exceptions to rule:

But it has since been decided, that where the whole delay has arisen from the part of the defendant by bills in Chancery for injunctions, and by obtaining time for payment, &c. execution may issue after the year without any *scire facias*, for that the *scire facias* was only intended to prevent surprise. *Michell v. Cus*, Burr. 66c.

When delayed by injunctions, &c.

or by writ of error:

So if the delay be occasioned by writ of error, though for many years, yet execution may issue immediately upon affirmance of the judgment without a *scire facias*. *Winter v. Lightbound*, Str. 301.

Otherwise *scire facias* necessary.

If, however, without any such causes, execution be not sued out within the year and day, the judgment must be revived by *scire facias*, and judgment obtained thereon, before execution can issue.

If writ sued out, returned, and continued, though not executed, it is sufficient.

But the writ need not be actually executed within that period. For if the *fi. fa. ca. fa.* or *elegit* be but sued out and returned within the year, continuances may be entered upon the roll from term to term, to the time of the execution, which may be at any time after the year, and as good as if the judgment had been revived by *scire facias*. *Aires v. Hardress*, Str. 100.

The writ, in such case, must be returned and filed, for the mere suing out and continuing it on the roll will not be sufficient. *Player v. Baldwin*, 2 Wil. 82. Bar. 213.

One sort of writ, so returned, will support a different sort afterwards sued out.

One sort of writ, so sued out and returned, will support the awarding of a different kind of writ afterwards. Thus a *ca. fa.* may issue after the year, upon a *fi. fa.* having been properly sued out, returned, and continued. *Ib.*

Against whom the writs lie.

The writ of *capias ad satisfaciendum* does not lie against *peers of the realm or their wives, or peers of Scotland, or members of parliament* (except upon a statute merchant, pursuant to the statute of 11 Edw. 1. or statute staple, according to the 27 Ed. 3. or on a recognizance in nature of a statute staple, upon the 23 Hen. 8. c. 6).

Nor against *executors or administrators*, for the debt of the testator or intestate, except a *devastavit* is returned, and then a *ca. fa.* lies against their persons, or a *fi. fa.* against their goods.

An *elegit* lies against the peers of the realm, as well as others; and also against executors and administrators, upon a *devastavit* returned.

So

So does a *fieri facias*.

If the plaintiff die before execution, it cannot issue till *scire facias* sued out by his representative, and judgment thereon; after which, such representative will be entitled to the money. Cro. Eliz. 459. In case of death, where the action is single.

So, if defendant die before execution, *scire facias* must issue against his representative; and after judgment thereon, execution may go against the goods of the deceased in his hands.

But if A. recovers judgment against B. and B. dies in the vacation within the year, A. may sue a *fieri facias* as of the precedent term, and levy the goods of B. in the hands of his executors. *Odes v. Woodward*, Ray. 849.

If an administrator, *durant' minorit'*, recover judgment, and afterwards the executor comes of age, he may have a *scire facias* on this recovery. *Law of Ex.* 7.

Where baron and feme recover land and damages, and baron dies, the feme shall have execution of damages. *Law of Ex.* 8. In cases of baron and feme.

So if baron and feme recover judgment in right of the feme, and she dies, baron shall have execution. *Ib.* 10.

If baron and feme executrix obtain judgment, and the feme dies, the baron cannot have execution, but administrator *de bonis non*. So, if they obtain judgment on a *scire facias*. Cro. Car. 464. Anon.

In an action against a feme covert only, to which she pleads coverture and verdict for defendant, a writ of *fieri facias* for the costs, directing the sheriff to levy and pay them to defendant *and her husband*, would be irregular; it being a maxim, that a person not a party to the record cannot be benefited nor charged by the process without a *scire facias*: But the wife might have had process in her own name, because the plaintiff having

having declared against her as sole, he was concluded from denying it. *Wortley v. Rayner*, Do. 637.

If baron and feme are taken in execution, the feme shall not be discharged. Bar. 203. *Berriman v. Gilbert and Ux.* But if the feme only is taken, she shall be discharged. Bar. 207. *Rownson and Ux. v. Williamson*, Pract. Reg. 208. But if baron and feme are taken in execution, and the baron escape, unless the plaintiff will retake the baron, the feme shall be discharged. 1 Vent. 51. *Jackson v. Gabree*.

In trover, if there is judgment and execution against baron and feme, the court will not discharge the feme, unless there is fraud or collusion between plaintiff and the husband to keep her in custody. Str. 1167. *Pitts v. Meller*. So in battery by defendant's wife of plaintiff's wife, the court will not discharge the wife who is only in execution, if it appears there is no design to screen the husband. Str. 1237. *Finch v. Duddin*, Wil. 149. Though said, in Cro. Car. 513. that if judgment be recovered against baron and feme for the contract, nay, even for the personal misbehaviour of the feme during her overture, a *capias* shall issue against baron only.

If judgment is recovered against baron and feme for the debt of *feme dum sola*, a *capias* may issue to take both baron and feme in execution. Bar. 203. But if an action is brought originally against *feme dum sola*, and pending the suit she marries, a *capias* shall be awarded against her only, and not against baron. Cro. Jac. 323. *Doyley v. White*.

Action against baron and feme; for debt contracted by her *dum sola*; after judgment against them, the bail rendered them both to prison in discharge of bail, and on motion she was discharged. 3 Wil. 124. But where judgment and execution are against husband and wife, she shall not be discharged, but only where she is in custody upon mesne process; and when husband and wife are rendered in discharge of bail after judgment against them, they are in the same situation as if bail

had never been put in; and not being charged in execution, the wife must be discharged out of prison. *Ibid.*

Execution may issue against one partner, in which case the partnership-goods are taken and sold, and the sheriff must pay over to the other partner, or partners, a share of the produce proportioned to his or their share in the partnership-effects. *Eddie v. Davidson*, Do. 650. Com. 217. Sal. 392.

In popular actions, there shall be but one execution for king and party. Law of Ex. 63. In popular actions.

If the action be against two or more, and judgment recovered against all, execution must go against all, and not against part only, and the same kind of execution must go against all. In joint actions.

If two be bound *jointly* and *severally* to A. and A. sue them *jointly*, A. may have a *capias* against them both, and the death or escape of one shall not discharge the other. But A. cannot have a *capias* against one, and another kind of execution against the other; because, though they be two several persons, yet they make but one debtor, when A. sues them *jointly*. But if A. sue them *severally*, he may sever them in their kinds of execution; though if once a satisfaction be had of one, or against the sheriff for an escape of one, the other may be relieved by an *audita querela*. Hob. 59.

Verdict against *four* defendants, judgment by default against the *fifth*, error brought in the name of the fifth only; and on motion, the court gave leave to take out execution against the other *four*. Bar. 202. *Mason v. Symmonds and others*.

Judgment in trespass against *four*, execution must be against all; and if they bring error, and one dies, by which the writ of error abates, then plaintiff may sue execution against the surviving three, suggesting the death of the fourth on record, but need not sue a previous *scire facias*: for that is only necessary when a new party to the judgment is to be benefited or charged by the execution, Salk. 319. *Howard v. Pitt*, Show. 404.

Where

How, if one plaintiff or defendant dies.

Where there are several plaintiffs or defendants, and one of them dies, execution may be sued by or against the survivors, upon suggestion of the death made upon the roll. *Withers v. Harris*, Ray. 808.

C.

C. Into what Places Execution may go, and herein of the *testatum* Writs.

Where *capias* *satisfaciendum* should issue,

and of the *testatum* *capias* *satisfaciendum*.

The writ of *capias ad satisfaciendum* must be issued in the county where the venue is laid; and if the defendant cannot be found there, a *testatum capias ad satisfaciendum* may be issued into any other county. These writs may both issue the same day, and be sealed together; but it is necessary that a *ca. fa* be sued out to ground the *testatum*. The court, however, will not inquire strictly into the time when the original *ca. fa.* issued, if it be but afterwards returned and entered on the roll.

Of the *feri facias* and *testatum*.

So it is also with respect to the writ of *feri facias* and *testatum feri facias*.

What necessary to support *testatum*.

They are generally both sued out together, and the *fi. fa.* is left with the sheriff for a return of *nulla bona*.

For if a *testatum feri facias* be sued out without any original *feri facias* having issued, it will be set aside for irregularity. *Brand v. Mears*, 3 D. & E. 388.

Unless such original *fi. fa.* be afterwards produced and entered on the roll. *Ib.*

And then it will do, though error be brought. *Ib.*

So the court will not set aside a *testatum capias ad satisfaciendum* sued out without an original *capias*, though a writ of error has been brought, if a *capias ad satisfaciendum* be afterwards sued out, returned, and entered on the roll. *Milstead v. Coppard*, 5 D. & E. 272.

How *feri facias* may be amended and converted into *testatum*.

If a *feri facias* be sued out, (when it should have been a *testatum feri facias*,) without any other *feri facias* having

ing originally issued, and the plaintiff afterwards sues out an original *feri facias*, the court will permit the party to amend the former on paying the costs, though error brought. *Cowperthwaite v. Owen*, 3 D. & E. 657.

As to the *elegit*, a man may award on the roll as many *elegits* as he pleases, and execute all or any at his pleasure; but it is said, if he awards an *elegit* in one county, extends the lands upon the writ, and afterwards files it, he is barred, and cannot sue out an *elegit* into another county, but an *actual writ* must be sued out, returned, and filed before an award can be entered on the roll. Imp. B. R. 5 Edit. 396.

Where *elegit* should issue.

It is not necessary to insert the form of a *testatum* in a *testatum writ*, so as that it may appear from the writ itself to be a *testatum*. 2 vol. Rules and Orders B. R. and C. B. 79. Pract. Reg. 210. 212. But there must be an award of a *testatum* upon the roll. *Oates v. Forest*, Bar. 197.

How far necessary to appear a *testatum* in the writ.

Judgment in B. R. a *feri facias* into London, returned *nulla bona*, and a *testatum* into Montgomeryshire, to which the sheriff returned, that the writ of our lord the king does not run into Wales, but at the king's suit, or where he is concerned. *Per Cur.* On a judgment in this court, execution may be awarded into Wales, or a county palatine. Cro. Jac. 484. Cro. El. 445.—Lands in Wales are pleadable here. *Hetley*, 18, 20, 21. 2 Bulf. 54. 156.—If the writ did not run there, yet the sheriff, being an officer of the court, ought not to question it, but to make return of the execution of it. And the court accordingly ordered the sheriff, upon a penalty, to return the writ, as he should stand by it: saying, that sheriffs in Wales ought to execute judicial writs, for the court has none to write to there, as in counties palatine, where they write to the chancellor or chamberlain, or warden of the cinque ports. An *elegit* may be executed in Wales, and why not a *feri facias*? If it could not, the party would be without remedy; for he cannot bring an action there upon this judgment; and he cannot outlaw the defendant, because this is on a bill of debt against an executor. *Draper v. Blainey*,

Of issuing writs of execution in to Wales;

Blainey, 1 Lev. 291. Ray. 205. 2 Saund. 193. 2 Keb. 649. 657. 724.

into county palatine.

Motion to have restitution of goods levied by a *fieri facias* out of B. R. in the county palatine of Chester, denied. *Per Cur.* Executions may well issue out of this court, to the county palatine, on a judgment originally given here. 1 Lev. 256. *Anon.*

D. Of the *Teste* and Return of the Writs of Execution, and of amending the same.

Of the *teste*, if issued out of term; if in term.

If the writ of *capias satisfaciendum* or *fieri facias* be issued out of term, let the *teste* be the last day of the term; if issued in term, *teste* the writ the first day of the term (although the judgment is not signed till four days after).

Though *teste* before judgment, it may be good.

Execution may be good though the writ bear *teste* before the judgment signed; for the writ of execution, if issued out in vacation, may bear *teste* of the precedent term, even of the first day of that term, and judgment perhaps not signed till later in term, or in the vacation. *Parsons and Gill*, Com. 117.

Of the return, if by bill or original.

If the proceedings are by bill, execution must be made out returnable on a day certain; if by original, on a general return-day.

Of the days between *teste* and return.

There need not be fifteen days between the *teste* and return of any *capias satisfaciendum* or *fieri facias*; 13 Car. 2. c. 2. s. 7., except to fix bail, or in outlawry.

And then, if the proceedings are by original, there must. Bar. 76. But if proceedings be by bill, there need be only eight days between *teste* and return of *capias satisfaciendum* to charge the bail. Sal. 602. Ray. 1177.

If returnable on a general return when it ought to have been a day certain, bad.

In proceeding by bill *capias satisfaciendum* returnable on a general return-day, and not a day certain, as it ought to have been, was quashed, and defendant ordered to be discharged by supersedeas, with costs, defendant consenting to bring no action. *Per Cur.* Defendant

defendant cannot take advantage of this matter by writ of error, and if he could it would be unreasonable to keep him in custody till the determination thereof. *Walker v. Harges*, Bar. 413.

So was a *ferri facias* quashed for same reason. *Furtado v. Miller*, Bar. 213.

If a writ of execution bear *teste* out of term, it is void; but the sheriff is justifiable, and yet shall not be liable to an action for an escape. Sal. 700. *Shirley v. Wright*. If tested out of term, void.

A *capias satisfaciendum* made returnable at a day which falls out of term, would not be void, though liable to be set aside on motion; nor can such a defect in it be taken advantage of by bail upon a general demurrer to a *scire facias* brought against them. *Campbell v. Cumming*, Bar. 1187. If *capias satisfaciendum* returnable out of term, only voidable.

In all continued writs, the *alias* must be tested the day the former writ was returnable. *Touchin's case*, Sal. 699. How *alias* writs to be tested.

In mesne process, if a term be omitted, the writ is void in all actions personal, and the sheriff shall not be charged, for the cause is discontinued and out of court by the intermission; and by not having a day in court by the return of the writ as he ought, the party may be at great prejudice by reason of the imprisonment in the mean time. But in *executions*, a *capias satisfaciendum* omitting a term is not void, for the party is not to have a day in court, his cause is at an end, and he must be in prison whether the writ be returned or not; nor is it necessary it should be returned. *Shirley v. Wright*, Sal. 700. *Ld. Ray.* 775. Writ of execution returnable two terms from the *teste* is well, not so in mesne process.

If a *capias satisfaciendum* is returnable pending a writ of error, it is no regular foundation for proceeding against the bail. *Derisley v. Deland*, Bar. 83. Ca. fa. to fix bail must not be returnable pending error.

A writ of execution executed may be amended by the record of the judgment; as where after a *capias satisfaciendum* executed, it was moved to amend the writ by the record of the judgment, making the defendant's name How writs of execution may be amended, and by what.

name *Edmund* instead of *Edward*, and rule afterwards made absolute. *Brown v. Hammond*, Bar. 10.

So a *capias satisfaciendum* may be amended in the return after it has been executed, by making it returnable before our justices instead of before us. *Hunt v. Kendrick*, 2 Blac. Rep. 836. The way to amend it is by motion to amend it by the award of the writ upon the roll.

A writ of *capias satisfaciendum* was amended after defendant taken in execution by altering the sum in the writ, and striking out part to which he was not liable. *Larouche v. Walsbrough*, 2 D. & E. 737.

There must be something to amend by.

Motion to quash *capias satisfaciendum* and discharge defendants, because judgment is upon a record in Wilts; and *capias satisfaciendum* directed to London, and no *testatum*. It was acknowledged, that a *testatum* was the usual course, but that there was no occasion to insert it in the writ, though it must appear in the record, and when that is made up, proceedings will be regular: but the court was of opinion that the writ must be quashed with costs, no roll being yet made up to amend by, and defendant was discharged, undertaking to bring no action. *Allen v. Allen*, Blac. 694. B. R.

§. Of the Mode of executing the several Writs.

E. 1. Of *Capias ad satisfaciendum*.

E. 2. Of *Fieri Facias*.

E. 3. Of *Elegit*.

Capias satisfaciendum, the highest writ of execution.

The first species of execution is by writ of *capias ad satisfaciendum*, which is a writ of the highest nature, inasmuch as it deprives a man of his liberty, till he makes the satisfaction awarded; and therefore when a man is once taken in execution by the sheriff on this writ, no other process can be sued against his lands or goods, except by stat. 21 Jac. 1. c. 24., in case of defendant's death.

By

By this writ the sheriff is directed to take the body of the defendant and have him at Westminster, on a day therein named, to make the plaintiff a satisfaction for his demand; and if he does not then make satisfaction, he must remain in custody till he does.

On the writ of *capias ad satisfaciendum* the sheriff cannot take bail, nor can he return that the party was rescued, for he may take the *posse comitatus*; and therefore if he returns that the party was rescued, an action lies against him for the escape, or a new *capias* against the party, for an ineffectual execution is as none. 2. Blac. Ab. 351.

When the defendant is once in custody upon this process, he is to be kept in *arcta & salva custodia*; and if he be afterwards seen at large, it is an escape, and the plaintiff may have an action thereupon for his whole debt. For, though upon arrests, and what is called mesne process, being such as intervenes between the commencement and end of a suit, the sheriff, till the statute 8 and 9 W. 3. c. 27. might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ; yet, upon a taking in execution, he could never give any indulgence, for in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor.

If a *capias satisfaciendum* be against two or more, the sheriff may take the bodies of all in execution. 5 Rep. 66. 11 Rep. Godfrey's Case.

On this writ, the sheriff may not break open any man's house to arrest him, but in all cases when the door is open he may enter to make execution of the body. But yet, in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the king and commonwealth are concerned, the general case is excepted: When the writ is at the suit of the king, then the sheriff, or his officer, after request to have the door opened and refusal, may break open the house to take the body. Co. 91. 2 Show. 67. pl. 78. But he ought first to signify the cause of his coming, and request the owners

Operation of writ:

how sheriff must act thereon;

and keep defendant in close custody.

How, if *capias satisfaciendum* be against several.

Sheriff must not break defendant's house open to take him,

except at the king's suit;

to open the door. 3 Co. 91. Cro. Eliz. 908. 4 Leon. 41. pl. 111. Cro. Eliz. 909. *Ib.* 714. pl. 17.

but he may
another man's,
if defendant hid
there.

But a man's house is no protection for another, therefore the sheriff may break it open to take him. Fof. Cr. L. 319.

Sheriff must
not receive the
money from de-
fendant, but
only take his
body.

In debt on a judgment, the defendant pleaded that he was taken in execution by *capias satisfaciendum* on that judgment, and had paid the money to the sheriff; and it was held to be no plea, because, though he does pay it to the sheriff, yet the sheriff may be insolvent, or may die and leave no assets, and then the party will be never the better. Freem. Rep. 842. And so it was held in Baker's case, who pleaded payment to the marshal being in execution, and held to be no plea. Lutw. 587. 12 Mod. 385. And in 12 Mod. 230. the sheriff hath no power to receive money of the defendant upon a *capias*, for his business is only to execute his writ. And if in such case the defendant pays the sheriff, and he afterwards becomes insolvent, and does not pay the plaintiff, such payment shall not excuse the defendant. *Per Holt, C. J.*

Payment to
sheriff not
good;

but otherwise
to plaintiff's
attorney.

But payment to the plaintiff's attorney upon record would be good, for that is payment to the plaintiff himself. Morton's Case, 2 Show. 138.

Sheriff cannot
return that
money was
paid to him
under *capias*
satisfaciendum,
and afterwards
levied on ano-
ther execution,
whilst in his
hands.

Defendant, arrested by a *capias satisfaciendum*, paid the money to the sheriff's officers before the return. Defendant delivered to the sheriff a *feri facias* against the plaintiff, upon which the sheriff levied the sum therein expressed, out of the money in his hands, by the *capias satisfaciendum*, and upon being called upon to return the *capias satisfaciendum*, made the return thereof to the above effect, which the court held insufficient; and accordingly ordered him to pay the money paid to him upon the *capias satisfaciendum* to the plaintiff, deducting his poundage. *Staple v. Bird*, Bar. 214.

E. 2. Of executing the *Fieri Facias*.

Fieri facias,
why so called.

The next species of execution is against the goods and chattels of the defendant, and is called a writ of *feri facias*,

facias, from the words in it where the sheriff is commanded *quod fieri faciat de bonis*, that he cause to be made of the goods and chattels of the defendant, the sum or debt recovered.

By a *feri facias* the sheriff may take all goods and chattels of the defendant which he might formerly take upon the *levari facias*; for the *feri facias* includes the *levari facias*. 2 Inst. 394.

What may or may not be seized under a *feri facias*.

So he may take and sell an annuity of 40 *l. per annum* granted by the king for years, to be paid by the receiver of the court, for it is in the nature of a rent-charge. R. 2 Cro. 79.

So he may extend or sell a term for years. 8 Co. 171. A.

So he may cut down and sell corn growing on the land, for the lessee has an interest in it. Poole's Case, 1 Salk. 368.

So utensils for trade erected by the defendant, though fixed to the land, as coppers, fats, pavements, &c. Sal. 368. Poole's Case.

And after sale, the defendant shall not have his term again, though the plaintiff be satisfied his debt by the profits. Mo. 873.

So if goods are taken in execution at the suit of B. and the sheriff returns *nulla bona*, they shall be afterwards taken at the suit of C.; for the property is not vested in B. nor in the sheriff. Underwood v. Mordant, 2 Ver. 238.

But the sheriff, upon a *feri facias*, cannot take things fixed to the freehold, as doors, windows, &c. Com. Dig. tit. Execution.

Nor furnaces, coppers, &c. fixed, Dub. 1 Rol. 891. l. 50. R. cont. 1 Salk. 368. if erected by the defendant for the use of his trade. *Vide supra*.

Nor hearths, chimney-pieces, &c. put up by the defendant for the use of the house, and not for his trade. 1 Sal. 368.

So the sheriff cannot take goods in pledge. Com. Dig. Execution, C. 3.

Or demised to another. Id.

Nor goods taken and in custody of the sheriff upon a former execution. *Bachurst v. Clinkard*, Show. Rep. 173. *Letchmere v. Thoroughgood*, 3 Mod. 236.

Nothing can be taken in execution that cannot be sold, as deeds, writings, &c. *Francis v. Nash*, Cases Temp. Hardw. 53.

Bank notes, &c. cannot be taken in execution. *Ibid.*

It is laid down, in *the King v. Deane*, 2 Show. 88. That if a sheriff on a *fiery facias* sell a lease or term of a house, he cannot and must not put the person out of possession, and the vendee in, but the vendee must bring his ejectment. But this, perhaps, may not be so settled a point as to extend to all cases; for per Mr. Justice Buller, in the case of *Taylor and Cole*, 3 D. and E. 298.

How far sheriff, on sale of a term, can turn tenant out of possession.

"It seems to me, that where there is a tenant in possession, and the execution is against the landlord whose term is to be sold, the tenant cannot be turned out of possession; but that is very different from the case where the debtor himself is in possession; in such case, I incline to think that the sheriff may turn him out of possession. However, I give no opinion on that at present, because it is not necessary to the decision of this case."

Money levied by sheriff for defendant may be sometimes retained for plaintiff.

If a plaintiff cannot find sufficient effects of the defendant to satisfy his judgment, the court will order the sheriff to retain, for the use of the plaintiff, money which he has levied in another action at the suit of the defendant. *Armistead v. Philpot*, Do. 231.

Sheriff must be cautious to take the goods of the right person.

The sheriff is bound at his peril to take only the goods of the defendant; for, if he take goods of a stranger, he is liable to an action in trover or trespass. *Keb.*

Keb. 693. Therefore, if he doubts whether the goods shewn him are the defendant's, he may summon a jury *de bene esse* to satisfy himself whether the goods belong to the defendant or not; this will justify him in returning, that the defendant has no goods within his bailiwick, and mitigates damages in an action of trespass if the goods seized should not happen to be the defendant's. Dalt. 146. Do. 40.

If on a *feri facias* against A. a bailiff takes the goods otherwise liable of B., trespass lies against the sheriff. *Ackworth v. Kempe*, Do. 40. to an action.

Trespass will lie against the high sheriff for the bailiff's taking the goods of A. instead of B. under a *feri facias*. *Sanderfon v. Baker*, Blac. 832. S. C. 3 Wil. 309.

If the sheriff have a *feri facias* against a man's goods, and before execution he pay him the money, in this case he cannot do execution after; and if he do, trespass lies: nor can he deliver them to the plaintiff in satisfaction of the debt, but he must return to the court the execution of his writ. Cro. Eliz. 504. Noy. 56. Dalt. 529. On *feri facias* defendant may pay sheriff the money;

If the defendant tenders the debt, it is a wrong for the sheriff to sell the goods. 1 Keb. 655. or tender it;

If the sheriff levy the money and give it to the plaintiff, though he never made any return to the court, it is good enough, 4 Rep. 64., for the end of the execution is answered.

Payment to a sheriff on a *feri facias* is a good plea, because he hath authority to levy the debt. 2 Lev. 203. and such payment is a good plea. *Taylor v. Bekon*. 2 Jon. 97. Skin. 665. 5 Mod. 296.

Sheriff on a *feri facias* levied the debt; the defendant brought a bill in Chancery, and got an injunction to stay the money in the sheriff's hands; the plaintiff and his attorney (both prisoners in the Fleet) moved the court against the sheriff to return the writ; the sheriff prayed the direction of the court; for if he return the writ he must pay the money, and then he shall be committed. Though sheriff receives injunction from Chancery to retain the money levied, he must still return the writ.

mitted by the Chancery for breach of injunction; and if not, then the K. B. will amerce him. The court took no notice, but ordered a return, or they would commit him; nor would they any way assist him. 8 Mod. 315. *Wilson v. Aldridge*.

From what time goods bound.

Formerly from teste of writ;

not from judgment;

but this introduced abuses;

to prevent which, by stat. 29 Car. 2. c. 3. goods now bound from delivery of writ to sheriff.

But this is only intended as to strangers.

This writ, at the common law, bound the defendant's goods from the *teste* of the writ; so that any sale after that was void, because the goods from the time of the *teste* were attendant to answer the execution; for the execution at common law being only on the goods, if they had not allowed the goods to be bound, as if the party had transferred them, they thought every execution might be avoided by sale; and it was presumed, that the sheriff should execute such writs immediately, and that there would be notice in the neighbourhood, that they might not be deceived; but the goods were not bound by the judgment, because the judgment was in force for a whole year; and it would be hard that none against whom judgment was pronounced, should buy or sell within that time: but men abused the notion of the retrospect of the goods being bound by the *teste* of the writ to make sales uncertain, for they took out writs one under the other without delivering them to the sheriff; by which they bound the goods of their debtors, and consequently made their sales and commerce uncertain: To prevent which, the statute of frauds and perjuries binds the goods only from the delivery of the writs to the sheriff, enacting, "That no writ of execution shall bind the property of the goods but from the time of its delivery to the sheriff, under-sheriff, or coroners; who, upon receipt thereof, (without fee) shall indorse on the back thereof the day of the month and year when they received it;" 29 Car. 2. c. 3., made perpetual by 1 Jac. c. 17. s. 5.; which was no more than restoring the old law, which supposed the writ to be delivered to the sheriff immediately from the *teste*. 8 Co. 171. Cro. Jac. 451. Cro. Eliz. 174. Sid. 271.

This must be intended as to strangers who might have a title to the goods between the *teste* of the writ and delivery thereof to the sheriff; but as to the party himself; his executors, and administrators, the goods since

Since the statute as before, are bound from the *teste*.
1 Vent. 218. Comb. 33. 2 Show. 485. 6 Mod. 225.

If two writs of *feri facias* bear *teste* the same day, the sheriff at common law, and now, since the statute, is bound to execute that which was first delivered to him; Salk. 320. Carth. 419.; therefore the time ought to be marked when the sheriff receives those writs in office.

If two writs of same date be delivered, which is to be executed first?

Where two writs of *feri facias* against the same defendant are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution; and if the person claiming under the second execution pay the sheriff the amount of the debt under the first execution for his security, the court will not compel the sheriff to refund that money on motion. *Hutchinson v. Johnston*, 1 D. & E. 729.

In an action against the sheriff for a false return to a *feri facias*, the plaintiff delivered a writ of execution to the sheriff, under which his officer levied the debt, and made a bill of sale; then the sheriff discovered a former execution in the office, and returned *nulla bona*: on this case the defendant obtained a verdict. *Rybot v. Peckham*, 1 D. & E. 731. N.

The property of the goods is vested by the delivery of the *feri facias*, and an extent afterwards for the king comes too late, and that on the statute of frauds, Comb. 123.; for when a judgment is once executed, the goods are in *custodia legis*, and neither exchequer-process or assignment from commissioners of bankrupts will touch them. *Letchmere v. Throogood*, 3 Mod. 236.

An extent too late after delivery of *feri facias*.

If goods be taken in execution on a *feri facias* against the king's debtor, and before they are sold an extent come at the king's suit, grounded on a bond debt tested after the delivery of the *feri facias* to the sheriff, these goods cannot be taken upon the extent. *Rorke v. Dayrell*, 4 D. & E. 402. Do, 415. Ray. 307.

An extent cannot be antedated.

An extent cannot be antedated, but must bear teste at the day it issues, though it be out of term: *Rex v. Mann*, Str. 749.

Of fraudulent executions by giving preferences, and the like, and of the effect thereof.

If A, indebted to B. and C., after being sued to judgment and execution by B., go to C. and voluntarily give him a warrant of attorney to confess judgment; on which judgment is immediately entered, and execution levied on the same day on which B. would have been entitled to execution, and had threatened to sue it out; the preference so given by A. to C. is not unlawful nor fraudulent within the meaning of the stat. 13 El. c. 5. *Holbird v. Anderson*, 5 D. & E. 235.

A first *feri facias* executed fraudulently, a second *feri facias*, at the suit of another, executed afterwards shall stand and be preferred; and the matter was properly left to a jury. *Bradley v. Wyndham*, Wil. 44.

Of the power of sheriff in making execution under *feri facias*; as to breaking open chests, &c.

By this writ the sheriff is commanded to levy the debt of the goods and chattels of the defendant; and he is therefore indemnified as far as he acts necessarily in order to the taking of the goods; and therefore if he breaks open a chest in which goods are locked up, or a barn not adjoining to a dwelling-house, which is made for the conservation of goods only, he is indemnified by the writ; but he is not by the writ authorized to break the dwelling-house, which is built for the protection of the man and his family. Sid. 189. Keb. 698. 2 Show. 87. Palm. 54. If he gets into the house, the doors being open, there begins the execution; for the rest of the house is only for the protection of the goods, and therefore he may enter and finish the execution of his writ. But though the sheriff be a trespasser in the execution of the process, yet when the writ is served and the money levied, the plaintiff shall have the benefit of it, and the party is left to his remedy against the sheriff. Browne 50. 5 Co. 91. 3 Inst. 162. Mod. 668. Yelv. 28. Cro. Eliz. 908. Dalt. 350. But the protection of a man's house, as before hath been said, extends only to himself and family; for if a stranger, to elude the execution, receives the defendant's goods into his house, the sheriff's authority shall reach them; because a design to elude the law shall not be protected by the law; the sheriff

breaking open houses to get at goods;

sheriff might seize him in the stranger's house, because the defendant's leaving his own house has waived the benefit of the law. 5 Co. 93. Sid. 186. The protection of a man in his own house was very agreeable to the ancient law, because in personal contracts they did only subject their chattels and not their persons nor freeholds; and though afterwards, by subsequent laws, the freehold and person were made liable to execution, yet they have not taken away the privilege a man had by common law to defend his own house, which still continues, unless where the execution is by *habere facias seisinam* or *possessionem*. only protected in a man's own house.

By virtue of this writ, the sheriff, on the seizure of the goods, hath such a property in them, that he can maintain trespass or trover; for he has the goods to sell that he may have the money in court; and therefore when he once seizes them, he has the property in them for that purpose. Sid. 438. pl. 3. Vent. 52, 53. Mod. 30. pl. 75. 2 Saund. 47. Lev. 282. 2 Vent. 218. Salk. 222. Vent. 52. And if the defendant dies after the writ delivered to the sheriff, he may execute the same on the goods in the hands of the executor or administrator of the deceased; 3 Wil. 399. Comb. 33. 2 Id. Ray. 808. 850. 1073. 12 Mod. 130. 241.; because the sheriff was entitled to seize them from the time of the writ. What property in the goods is vested in sheriff by the seizure. How he may execute writ if defendant dies.

The sheriff that begun the execution shall end it though he is out of office. Salk. 323. Same sheriff who begun shall finish execution.

If plaintiff dies, execution does not abate; but sheriff must go on to execute his writ. Salk. 322. 6 Mod. 290. It does not abate by plaintiff's death.

When a sheriff takes goods in execution, he may sell them at any rate, if defendant refuses to pay the debt; Vent. 7.; and they may be sold to the plaintiff, though not actually delivered to him. Comb. 452. But he is to sell them for ready money, because he is immediately charged to the party for whom the sale was. 6 Mod. 83. *Marley v. Staker.* Of sheriff's authority as to selling the goods, and how he ought to act therein;

The

must sell them,
or attempt so to
do;

cannot keep
them himself,

or let plaintiff
have them.

If he returns
that goods re-
main in his
hands, &c. to a
certain value,
he may after-
wards sell them
for less;

but he must not
value them too
high.

No appraisment
on *fieri facias*.

If he levies
more than debt,
he may keep
surplus till de-
manded.

An action of
debt or assump-
sit lies against
sheriff for mo-
ney levied.

The sheriff cannot detain the goods on an execution in his own hands, and satisfy the debt of his proper money; but he ought to sell them upon a *venditioni exponas*, and may return on his so doing, that they remain in his hands for want of buyers; for the law requires of sheriffs a strict execution and observance of the writs directed to them; Noy. 107. Lutw. 589. *Langdon v. Wallis*; neither ought the goods to be delivered to the plaintiff in satisfaction of his debt, but ought to be sold. 2 Vent. 95.

If the sheriff returns that he has goods to the value of 72*l.* which remain in his hands for want of buyers, it is no estoppel, but that he may sell them for less; for it appearing on the return that they are not sold, but that they remain in specie in his hands, the value cannot be so set, but that it may be altered between that and the sale; therefore if on the *venditioni exponas* it appears that he has sold those goods for less, the plaintiff may have a new execution for his debt. Cro. Eliz. 598. Cro. Jac. 515. Godb. 276.

Yet if the sheriff values them so high as none will buy them at that rate, he must take them himself. 2 Show. 89. *The King v. Bird*.

On a *fieri facias* there need no appraisement, but on an *elegit* there must. *Beeley v. Sampson*, 2 Vent. 95.

If *fieri facias* be awarded to the sheriff to levy 20*l.* and he sells to the value of 40*l.* and returns the *fieri facias* with 20*l.* in court, he may detain the surplussage until demand made of it; for he is not bound to search out the defendant. Noy. 69. He ought not to take more than will satisfy. *Ibid*.

If the sheriff levies the money upon a *fieri facias*, though he makes no return upon the writ, yet an action of debt, account, or *assumpsit* lies against him and his executors, because it is a debt in the sheriff by the levying the money; and the defendant, by the sheriff's levying the money upon him, can, on a *scire facias* to have execution, plead this in bar, or upon a second *fieri facias*, relieve himself by an *audita querela*; for the

lien

lien of the judgment is discharged by the sheriff's executing the writ, and if the plaintiff had not this action against the sheriff, he would be remediless. Sir W. Jones 430. Rol. Abr. 598. 921.

The sheriff to this writ may return *nulla bona*, and that the defendant is a beneficed clerk, having no lay fee, and that he is rector or vicar of the parish church of B. Offic. Brev. 97. Dalt. 219. Sid. 276.

What returns sheriff may make to fieri facias, *nulla bona*, &c.

The sheriff may return on this writ, that the goods remained in his hands for want of buyers, and this return is good, because the sheriff is directed to levy the money from the goods, which implies an authority to sell them; yet he may not be able to find buyers, and therefore, such return is to be allowed. Yelv. 44. Sid. 438. 2 Saund. 47. Mod. 751. Vent. 52.

That goods remain in his hands for want of buyers.

If the sheriff delays or refuses to sell, the legal and proper mode of compelling a sale is by writ of *venditioni exponas*, upon which he must return the money into court. *Cameron v. Reynolds*, Cow. 406.

Sheriff compelled to sell by venditioni exponas;

The sheriff is not obliged to execute a bill of sale at an appraised value, though he has even promised so to do. *Ib.*

need not make bill of sale at appraised value.

The sheriff is bound for the returned cost or value of the goods, though they are afterwards rescued. *Ld. Ray.* 1075.

Sheriff answerable for returned value.

It was formerly held, that if a sheriff takes goods in execution by virtue of a *feri facias*, and is out of office before they are sold, that in such case he could not sell and deliver the money to the party, because his authority determined with his office; but that he ought to deliver such money over to the new sheriff (as he doth the prisoners), and return, that thereupon a *venditioni exponas* may be awarded to the new sheriff. But since it hath been held, that though a new sheriff is made, yet the old may sell the goods so by him levied; but if he return the writ, that the goods are in his hands *pro defectu emptorum*, in such case a *disfringas* shall go to him, to deliver them over to the new sheriff, and after that a *venditioni exponas*. 3 Salk. 323. It seems that a sheriff may

How, if sheriff goes out of office before goods sold.

may sell goods after he is out of office, without a *venditioni exponas*. *Ld. Ray. 1073.*

But where a *feri facias* comes to a sheriff, and he goes out of office before it is executed, his successor may execute it, because such writ is general, and not directed to any particular sheriff by name; but it is otherwise, if directed to a sheriff by name. So note the difference between general writs to the sheriff, and special writs to a sheriff by name. *3 Salk. 147.*

Sheriff may return *nulla bona*, if property were an annuity not properly registered.

Where a person, against whom a writ of *feri facias* is taken out, is in possession of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable from thenceforth, the sheriff is warranted in returning *nulla bona*, if it appear that the memorial of such annuity was not registered according to the directions of the annuity act, 17 G. 3. c. 26. s. 1. for in that case the deed is absolutely void. *Crosley v. Arkwright, 2 D. & E. 603.*

When court will stay goods in sheriff's hands till dispute decided.

The court will not stay goods taken by *feri facias* in the hands of the sheriff, till a dispute concerning the property of them is decided, unless for the protection and at the request of the sheriff. *Shaw v. Tunbridge, Blac. 1064.*

When the defendant's goods are seized on a *feri facias*, the debt is discharged. *Ib.*

E. 3. Of executing the *Elegit*.

Introduction of *elegit*;

At common law, there was no execution which gave possession of the lands of a debtor; the only satisfaction was either against his goods and chattels by *feri facias*, or against the rent and profits of the land by *levari facias*. But by the 13 Edw. I. c. 18. it was ordained, "That where a debt is recovered or acknowledged in the king's court, or damages awarded, it shall be in the election of him that sueth to have a *feri facias* unto the sheriff to levy the debt upon the lands and chattels of the debtor, or that the sheriff shall deliver to him all the chattels of the debtor (saving his oxen and beasts of his plough), and the one-half of the land,

"land, until the debt be levied upon a reasonable price
 "or extent; and if he be put out of the land, he shall
 "recover it again by writ of *novel seisin*, and after that
 "by writ of *re-diseisin*, if need be."

From this *election*, which the party has, the writ of *why* so called;
elegit derives its name; and the entry is. *Quod elegit sibi*
executionem fieri de omnibus catallis & medietate terræ.

Upon this writ the sheriff is to impanel a jury, who how sheriff to
act thereon;
 are to make inquiry of all the goods and chattels of the
 debtor, and to appraise the same; and also to inquire
 as to his lands and tenements: And upon such inquisi-
 tion, the sheriff is to deliver all the goods and chattels
 (except the beasts of the plough), and the moiety of the
 lands to the party, and must return his writ, in order
 to record such inquisition in that court out of which
 the *elegit* issued.

And this cannot be done by the sheriff without an must take an
inquest.
 inquest; for the words of the statute are, "Upon a
 "reasonable price or extent," which must be found
 such by the oaths of twelve men, as is laid down and
 admitted by all the books which treat of this subject.
 2 Inst. 396. Co. Lit. 389. Dy. 100. 5 Co. 74.

When the jury have found the seisin and value of the How moiety of
lands to be set
out and deli-
vered;
 land, the sheriff, and not the jury, is to set and deliver
 a moiety thereof to the plaintiff by metes and bounds,
 not an undivided moiety. *Sparrow and Mattersack*, Cro.
 Car. 314.

If, therefore, upon an *elegit* the sheriff delivereth a
 moiety of an house without metes and bounds, such
 return is ill, and shall be quashed for uncertainty. Carth.
 453. *Pullen v. Birkbeck*.

But if there be several closes, or manors, or farms,
 or tenements, the sheriff is not bound to deliver a moiety
 of every particular close, or farm, or manor, or the
 like, but only certain tenements, making in *value* a
 moiety of the whole. *Den v. The Earl of Abingdon*,
 Do. 473.

But

But the sheriff ought to deliver a moiety only, for if he delivers more, it will be void, and plaintiff shall have a new execution. *Ld. Ray. 718. Pullen v. Birbeck. Berry v. Wheeler, 1 Sid. 91. Earl of Stamford v. Hobart, 239. 2 Salk. 564. Putten v. Purbeck.*

Inquisition
must be certain,
&c.

The inquisition ought to find the lands with *certainty*, and to shew the place and county where they lie, and where the inquisition is taken. *Dyer 208* And if the defendant be joint tenant, or tenant in common, it ought to be mentioned in the return. *Hut. 16. Brownl. 38.*

Sheriff cannot
give possession,
but ejectment
must be
brought.

The sheriff cannot give actual possession of lands on an *elegit*, but only deliver seisure, to enable the plaintiff to maintain an ejectment, whereby he may get into possession. *Jefferson v. Dawson, 3 Keb. 243. Den, Lessee of Taylor, v. The Earl of Abingdon, Do. 473.*

If sufficient
goods, lands
must not be
taken.

But it is to be observed, that although by this statute the lands of a debtor are made liable, as well as his personal estate, yet if the creditor takes out an *elegit*, and it appears to the sheriff that there are goods and chattels sufficient of the debtor's to satisfy the debt, he ought not to extend the lands. *2 Inst. 395.*

Difference be-
tween *elegit* and
fiery facias, as
to goods.

But an *elegit* executed upon goods only is not in effect as a *fiery facias*, for the *fiery facias* is executed by sale by the sheriff, but an *elegit* by the appraisement of the goods by a jury and delivery to the party. *Glascock v. Morgan, Sid. 184. Lev. 92. Keb. 105. 261. 465. Pullen v. Birbeck, Ray. 718.*

and in their
operation.

If, therefore, a writ of error be afterwards brought, and the judgment reversed, the goods in *specie* shall be restored, and not the value; but upon a *fiery facias*, the value, and not the goods, in *specie*. *Glascock v. Morgan, Lev. 92. 5 Co. 90. Goodyere v. Ince, Cro. Jac. 246.*

Sheriff must
abide by valua-
tion of jury.

The sheriff cannot deliver a lease upon an *elegit* at another value than what the jury had found it at; and the sale made by him is as good as if made in market overt. *Brownl. 38.*

When

When the inquisition is taken by the sheriff, it shall be returned and filed. Dy. 100. Inquisition must be returned and filed;

And it shall not afterwards be avoided upon any surmise of more than a moiety having been extended, or that it was extended at an under-value. 2 Inst. 396. not easily avoided afterwards;
2 Chan. Caf. 183.

But, before the filing thereof, court may examine it; but court will and if they find fraud, partiality, or the like, may stop inquire into it. the filing and award a new *elegit*. 2 Inst. 396.

Generally speaking, all tenements as well as lands of defendant may be extended on an *elegit*, as a rent or rent-charge, or the like. *Wotton v. Shirt*, Cro. Eliz. 742. What may be extended on an *elegit*;
Moor 32.

So a term for years, 2 Inst. 398.; or it may be sold as goods, for it is personalty; but if extended, there shall be no other benefit than as a common extent. 1 Brownl. 38. *Fleetwood's case*, 8 Co. 171. So lands in ancient demesne, Hob. 47.; or before in execution upon a statute, *Fulwood's case*, 4 Co. 65.; or which are liable to incumbrances by *cestuy que trusts*. Stat. 25 C. 2. c. 3. f. 10.

But not copyhold lands, 1 Roll. 888. 1.; nor a term for years of copy-hold lands made by the licence of the lord, *Id.*; nor a bare rent seck, Cro. Eliz. 66. *Walsal v. Heath*; *Heydon's case*, 3 Co. 9.; nor the glebe lands of a parson or vicar, Jenk, 207.; nor a tenement which cannot be granted over, as the office of a filazer, being an office of trust. Dy. 7, 6. not copyhold lands, &c.

If A. and B. recover several judgments against C., and A. sues out an *elegit*, and has a moiety of C.'s lands delivered to him, and then B. sues out an *elegit*, the sheriff can only extend a moiety of the remaining lands. *Huit v. Cogan*, Cro. Eliz. 483. How sheriff to execute different *elegits* sued out.

But if A. has two judgments against C., and in the same term takes out two *elegits*; on the one he may have a moiety of the whole, and on the other the other moiety, and is not restrained on the latter to a moiety of the How, if at suit of same plaintiff.

the moiety; for in judgment of law the whole term is but one day. *The Attorney General v. Andrew*, Hard. 23.

How, if *feri facias* delivered at same time.

If a *feri facias* and *elegit* be delivered at the same time with an extent at a common person's suit, the *feri facias* and *elegit* shall take place, because the goods shall be attendant to satisfy, in the first place, the judgment of the superior court. Brok. 97. 1 Brown. 38. Brok. 97.

§. Of the Lien for Rent upon Goods taken in Execution.

This lien created by statute 8 Ann. c. 14.

only for one year's rent.

By the 8 Ann. c. 14. "No goods or chattels whatsoever, lying or being in and upon any messuage, lands, or tenements which shall be leased for life, years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the execution is sued, shall, before the removal of such goods from off the said premises by virtue of execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of taking such goods or chattels by virtue of such execution, *provided the said arrears of rent do not amount to more than one year's rent*; and in case the said arrears shall exceed one year's rent, then the said party at whose suit the said execution is sued out, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the execution-money."

Different decisions on statute;

as to notice; to what rent entitled; not extend to ground landlord.

It has been adjudged, 1st, "That there must be a demand made, and notice given to the sheriff by the landlord, before removal of the goods, or an action will not lie for him. Str. 97. *Waring v. Dewbery*: 2d, That the landlord is entitled to his whole rent without deduction of poundage. Str. 643. *Gore v. Goston*: 3d, That a ground landlord, where there is an execution against

against the under-lessee, is not within the act. Str. 787. *Bennet's Case*: 4th, That after a landlord has had one year's rent paid, and there comes in another execution, he shall not have another year's rent paid. Str. 1024. *Dodd v. Saxby*; and 5th, That an action lies upon it by an executor or an administrator of landlord against a bailiff or sheriff for removing the goods off the premises, after notice, before the landlord was paid his year's rent. *Palgrave v. Wyndham*, Str. 212.

That action lies by executor of landlord for it.

But where goods were taken, and the money levied before administration taken out, it was held, that as the execution was executed he came too late; Str. 97. 214. *Fortesc. Rep.* 460.; this means that the goods were actually sold. But Powis, Justice, seemed to be of opinion to the contrary, who held, that the administration should have relation to the death of the intestate, because by the ecclesiastical law it is not to be granted within fourteen days of an intestate's death; which the other justices denied, and said, that relations, being fictitious, ought not to hold place against the right of strangers. *Gilb. Eq. Rep.* 223, 224.

When too late for lien to operate.

If the goods seized are not removed or sold by the sheriff so as to transfer the property therein, but defendant pays the debt, though the landlord has given notice and demanded rent, yet he is not entitled in such case.

Landlord not entitled if defendant pays debt, and goods not seized.

Upon the equity of this statute it hath been held, that under a commission of bankrupt, which is in the nature of a statute execution, the landlord shall be allowed his arrears of rent to the same amount in preference to other creditors, even though he hath neglected to distrain while the goods remained on the premises, which he is otherwise entitled to do for his entire rent, be the *quantum* what it may. 1 Atk. 103.

Upon the equity of the statute, same lien allowed under command of bankrupt.

A bill of sale held to be a removal of goods taken by a *feri facias*, and a year's rent must be paid the landlord out of the money levied by the sheriff. *Wes v. Hedges*, Bar. 211.

So allowed under a bill of sale.

P p

Instead

What best remedy for landlord in this case.

Instead of bringing an action against the sheriff, &c. when the goods are sold after notice, the best way for the landlord is to move the court, that he may have restitution to the amount of the goods which the sheriff has sold, if they amount to less than a year's rent; or if they amount to more, to have so much as will satisfy a year's rent.

How if sheriff's warrant altered.

Motion to have rent paid to the landlord out of the money levied. On shewing cause it appeared, that the sheriff's warrant on the execution, after it was sealed, had been altered, and a new bailiff's name inserted. *Per Cur.* The warrant being altered, no goods are taken in execution thereby. Let the bailiff and attorney, privy to the alteration, shew cause why an attachment should not issue against them. *Hann v. Capel*, Bar. 199.

What declaration need state in an action against the sheriff in this case.

In an action against the sheriff for taking goods without leaving a year's rent, the declaration needs not state all the particulars of the demise; but if it does, and they are not proved as stated, there shall be a nonsuit. *Brislow v. Wright*, Do. 665.

How landlord's claim affected by extent,

or distress.

If an extent comes in, the landlord cannot claim his rent, although distress taken the day before. Bunb. 269. pl. 345.; so an extent or an outlawry, although he had distrained three days previous to the entry and motion to be paid, under stat. 8 Ann. denied. Bunb. 5. pl. 5. If a distress be taken 29th October, and an extent dated 4th November, and corn, &c. seized, the landlord cannot have his rent, for no property was divested by the distress, and they were in the landlord's hands by way of pledge; Bunb. 42. Vent. 37. 2 Saund. 47.; but an attachment was refused, although a contempt to oppose the extent.

How extent shall prevail against a distress.

An immediate extent against the king's debtor tested after a distress for rent justly due to the landlord, with notice to the tenant, being the king's debtor, and appraisement of the goods and chattels, but before sale, shall prevail against the distress. *The King v. Cotton*, Esq. Parker's Rep. 112.

C. Of issuing a second Writ of Execution.

There ought not to be two executions existing at the same time.; but if one writ proves ineffectual another writ may issue; may be sued out.

Thus if a *feri facias* be issued, and the sheriff only levies part of the debt or damages recovered, the party may have either a *capias ad satisfaciendum*, or another *feri facias*, or an *elegit* for the residue.

In such case the sheriff should return the first *feri facias* and the levy thereon, which ought to be recited in the *ca. fa.* Salk. 218. Cro. Eliz. 344.; but if nothing be levied on the *feri facias*, there is no necessity to recite the sheriff's return in the *ca. fa.*, or its having been issued.

but the first writ should be returned.

But if a *capias ad satisfaciendum* first issue, and the body be taken, there cannot afterwards be a *feri facias* or *elegit*, for the body is deemed the highest satisfaction the plaintiff can have.

After a *ca. fa.* there can be no *feri facias* or *elegit*;

And by the common law, if defendant died in execution upon this writ, plaintiff had no further remedy; but now by stat. 21 Jac. 1. c. 24. plaintiff may after his death, sue out execution against his lands, goods, or chattels at his election.

except in case of defendant's death.

So with respect to the *elegit*, if the *lands* are extended upon an *elegit*, the plaintiff is for ever barred from having another execution; but if he levies on the goods only, and the sheriff returns *nihil* as to the lands, a *ca. fa.* may issue for the residue, or a *feri facias*; for the election is not complete unless the plaintiff has some benefit from the land; for the taking out the writ is not an actual election, but only in order to an election: and if there be no lands there is nothing to choose, and consequently no election; and it was said, that an *elegit* where there are no lands, is but in effect a common *feri facias*. *Bacon v. Peck*, Str. 226.

So if lands extended on *elegit*, no other writ afterwards; but if only goods levied, a *ca. fa.* or *fi. fa.* may go.

Rule in cases of execution.

For the rule is, that although the body and goods may eventually be taken in execution, or land and goods, yet that the body and land too cannot, upon any judgment between subject and subject, by the course of the common law.

In judgments upon a statute, &c. body, lands, and goods are rendered liable together. *Keb. 60.*

If party escapes on *ca. fa.* another may issue:

If a party taken on a *ca. fa.* escapes or is rescued, though the sheriff is hereby liable because he ought to have taken the *posse comitatus*, yet the plaintiff shall not be compelled to take his remedy against the sheriff, but may sue out another *ca. fa.*, or, if the first *capias* be not returned or filed, any other species of execution. Law of Exec. 117. Cro. Car. 40: 455.

if on *ca. fa.* only part levied; other writs may go;

but plaintiff must not mark it for part only and then sue out other writs.

In the case of *Howell and Hanforth*, C. B. Blac. 845, the court inclined strongly to think, that though at common law if the sheriff only levies part of the debt on a *fieri facias* marked for the whole, the plaintiff may have subsequent writs till the whole is levied; yet a plaintiff shall not mark it for part, and afterwards sue out subsequent writs for the residue, which would tend to great oppression.

Instance of this in an annuity case.

The above was the case of an annuity-bond with warrant of attorney to confess judgment; on failure of a quarterly payment, judgment was entered up, and *fieri facias* sued out, marked to levy only 20*l.* (the quarterly payment); afterwards on failure of another payment, another *fieri facias* was issued; but it was moved to set it aside on the ground of irregularity for want of a *scire facias* under stat. 8 and 9 Wm. 3. In which case the court pronounced this rule, "That on payment by the defendant of the arrears due on the annuity and costs, the *fieri facias* be set aside; but the judgment to stand as a security for future arrears, with liberty to apply to the court from time to time to sue out fresh executions thereon." 2 Blac. 845.

Rule for taking out execution in judgment on annuity bond.

First writ must be returned before second issues.

No second writ ought to issue before the return of the first. *Coppendale v. Debonaire*, Bar. 213. *Snope v. Hancock*, *ib.* 198.

So plaintiff must give notice of his having abandoned a former *committitur* which is erroneous, before he enters a second, rectifying the mistake. *Topping v. Ryan*, 1 D. and E. 227.

So committitur must be abandoned before a second is entered.

B. Of the Sheriff's Fees, Poundage, &c.

By the common law, no fees whatever were allowed to sheriffs; but this, instead of being advantageous to the subject, proved only oppressive; it opened the door to extortion: And to such an height did the evil gradually arise, that the legislature found it necessary to interfere, and to regulate the demands of sheriffs, by appointing certain fixed sums to be taken in cases of execution.

No fees at common law.

How introduced by statute.

The first statute to this effect is the (a) 29 Eliz. c. 4. whereby it is enacted, "That it shall not be lawful to or for any sheriff, under-sheriff, bailiffs of franchises or liberties, nor for any of their or either of their officers, ministers, servants, bailiffs, or deputies, nor for any of them, by reason or colour of their or either of their office or offices, to have, receive, or take of any person or persons whatsoever, directly or indirectly, for the serving and executing of any extent or execution upon the body, lands, goods, or chattels of any person or persons whatsoever, more, or other consideration or recompence, than in this present act is and shall be limited and appointed, (which shall be lawful to be had, received, and taken,) that is to say, twelve-pence of and for every twenty shillings, where the sum exceedeth not one hundred pounds, and six-pence of and for every twenty shillings being over and above the said sum of one hundred pounds that he or they shall so levy, or extend and deliver in execution, or take the body in execution, for by virtue and force of any such extent or execution whatsoever, upon pain and penalty that all and every sheriff, under-sheriff, bailiff of franchises and liberties, their and every of their ministers, servants, officers, bailiffs, or deputies, which at any time after the said first day of May now next ensuing, shall directly or indirectly do the contrary, shall lose and forfeit to the party grieved his

29 Eliz. c. 4.
(a) It is said, that the printed statute book is wrong, and that by the parliament-roll it is the 28th, and in an action reciting it as 28th, it was held well. Salk. 331. But it is usually brought as upon the 29th, 2 D. and E. 148, and held well. Blac. 1103.

The poundage allowed.

Penalty for offending against the statute.

“ *treble damages*, and shall forfeit the sum of *forty pounds* of good English money for every time that he, they, or any of them shall do the contrary; the one moiety thereof to be to our sovereign Lady the Queen, her heirs and successors, and the other moiety thereof to the party or parties that will sue for the same by any plaint, action, suit, bill, or information, wherein no *essoyn*, *wager of law*, or *protection* shall be allowed.

Statute does not extend to towns corporate.

“ Provided always, that this act, or any thing therein contained, shall not extend to any fees to be taken or had for any execution *within any city or town corporate**, any thing above-mentioned to the contrary thereof notwithstanding.”

Statute only extends to personal actions.

It was determined, that this statute did not extend to real execution, but only to executions in *personal actions*; and it was doubted whether the sheriff was entitled to any fees for executing an *elegit*, as it was difficult how to ascertain the fees. *Peacock v. Harris*, Sal. 332.

Q. Whether it extended to elegits?

But by 3 G. 1. c. 15. fees are allowed for executing elegits;

But by a subsequent statute of 3 Geo. 1. c. 15. s. 16. the fees for executing writs of *elegit*, and of *habere facias possessionem aut seisinam*, are regulated; viz. “ The sum of twelve-pence for every twenty shillings of the yearly value of any manor, messuage, lands, tenements, and hereditaments whereof possession or seisin shall be given, where the whole exceedeth not the yearly value of one hundred pounds, and the sum of six-pence only for every twenty shillings *per annum* over and above the said yearly value of one hundred pounds.”

and by 8 G. 1. c. 25. for executing extents.

And by the 8 Geo. 1. c. 25. s. 5. a like fee is given on executing an *extent* & *liberate*.

By 29 Eliz. on ca. fa sheriff was entitled to fees on the whole debt.

It was also resolved, that, by the 29 Eliz. c. 4., the sheriff, upon a *capias ad satisfaciendum*, was entitled to

* This only intends executions founded on judgments given in those courts where both judgment and execution are within a limited jurisdiction; but where the judgment is in *Westminster Hall*, though the execution be in a *city or town corporate*, fees are allowed, and the bailiff of the liberty, not the sheriff of the county, is entitled to them. Sal. 331. Dalt. 527. Latch. 19. 52.

his

his fees upon the whole debt. *Peacock v. Harris*, Sal.

332.

But instead of taking poundage on the sum really due, sheriffs, in actions on judgments, statutes, and recognizances, and the like, used to retain for their fees poundage to the full amount of the sum for which such judgments or securities were given, and which poundage often far exceeded even the debt due to the plaintiff.

Abuses introduced thereby.

To remedy which, the 3 Geo. 1. c. 15. f. 17. after reciting the grievance, enacts, That poundage shall not be taken for executing any *capias satisfaciendum* upon any judgment, &c. for any greater sum than the real debt *bond fide* due and claimed by the plaintiff amounts to, which sum the plaintiff is obliged to mark and specify on the back of the writ, before it be delivered to the sheriff: And, in case the sheriff shall take more, he is guilty of extortion; and for each offence shall forfeit to the party grieved treble damages, and double the sum so extorted, to be ordered by the court which issued the writ, in a summary way; and also 200 *l.*, one-half to the king, the other to the prosecutor in any court at Westminster, provided such suit be commenced within two years.

How remedied by 3 G. 1. c. 15.;

whereby poundage is only to be taken for the sum really due, and marked on writ:

Penalty for taking more, and remedy to party.

The statute of 29 Eliz. c. 4. does not extend to the crown. *Lake v. Turner*, Burr. 1983. But it was held, that an action brought in the Exchequer by the sheriffs of London, upon a bail bond taken by them in their own names, for the appearance of a defendant taken up upon an Exchequer process on the prosecution of the king's attorney-general on behalf of the crown, for custom-house penalties and forfeitures, and a *testatum capias ad satisfaciendum* to the sheriff of Hertfordshire against the bail, could not be considered as the suit of the crown, though averred to be for the benefit, and on the behalf, and at the expence of the crown, but that the sheriff who executed it was entitled to his poundage.

29 Eliz. does not extend to the crown;

nor formerly to actions on bail bonds in revenue cases.

Soon after this decision, poundage in such cases was expressly taken away by statute 7 Geo. 3. c. 39.; which

But by 7 Geo. 3. c. 29. it was extended to such cases.

enacts, " That the act of 29 Eliz. c. 4. shall not extend to allow any sheriff, &c. any poundage for taking the body of any person in execution upon any process at the suit of any sheriff, or other officer or minister of the crown, upon any bail-bond entered into for the appearance of any person prosecuted, either for any duties due or payable to his majesty, his heirs or successors, or for any penalty inflicted by any act of parliament, made or to be made, for the preventing the clandestine running or receiving any customable or prohibited goods; or in any case whatsoever, where the sheriff or officer executing such process would not be entitled to poundage, if the proceedings were or had been carried on directly in the name of the crown."

The chief of the above statutes are 29 Eliz.

The above are the different statutes by which the fees of sheriffs are regulated; the chief of which, as relating to personal actions, is the 29th Eliz.

Action lies thereon against sheriff:

Upon this statute an action will lie against the sheriff, if he or his officer take more than is allowed. *Woodgate v. Knatchbull*, 2 D. and E. 158.

Construction thereof.

By the act, it appears clearly to have been the intention of the legislature that the sheriff should be paid in proportion to the sum levied, and that the sheriff should only levy what is really due.

How expences of levy to be paid;

in common actions;

in actions for penalties.

In actions on simple contracts, and judgments for a debt certain, the expences of levying must be paid by the plaintiff, and not by the defendant. If, therefore, the judgment be for 200 *l.* the sheriff is at liberty to raise that sum, and no more, and the expences of levying must be paid out of the debt. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independant of the expences of the execution; and in those cases, the defendant is the party injured, by the sheriff's taking more than he ought. *B.*

Sheriff only entitled to poundage.

In strictness of law, the sheriff is not entitled to take any more than what is allowed by the statute.

It

It is his duty to obey the orders of the court, to seize and sell the goods immediately; he cannot be allowed the expence of an auctioneer, or even the levy-fee of a guinea (a); but the sheriff and the court are bound by the act of parliament.

No allowance for auctions, &c.
(a) It seems to have been for a long time the practice to take this fee. Blac. 1102.

If the plaintiff choose to have an auction, he must defray the expence out of his own debt to be levied; there is no colour to charge the defendant with it: the sheriff can only levy on the defendant that sum which is given by the judgment of the court; and if the defendant wish to have an auction, he must pay for it out of his pocket; it should make no part of the sheriff's account. *Ib.* 2 D. & E. 157.

How auction expences to be paid.

If, therefore, it appears by the sheriff's return of a writ of execution that greater fees have been taken by the levy than are allowed by the statute, the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved. *Ib.*

Sheriff liable to action; if it appears by return of writ that too much has been taken by him;

Or an action of debt may be brought by any common informer against the officer guilty of the extortion for the 40*l.* penalty. *Savage v. Smith*, Blac. 1101.

or to a qui tam action.

In this action if the plaintiff sets out the judgment on which the writ was founded, he must also prove it.

Q. Whether it is necessary to be set out? *Ib.* 1104.

If a sheriff levy under a *fiери facias*, he is entitled to poundage, though the parties compromise before he sells any of the defendant's goods, notwithstanding the words of the statute are allowing poundage on the sum, which the sheriff levies or extends and delivers in execution: and if after such a compromise either party rule the sheriff to return the writ, the court will discharge that rule with costs, to be paid by the party obtaining it. *Alehin v. Well*, 5 D. & E. 470.

Though parties compromise, sheriff entitled to poundage if he levies under *fiери facias*.

An under-sheriff cannot refuse to execute process till he has his fees; if he does, the plaintiff may bring an action against him for not doing his duty, or may pay him his fees, and then indict him for extortion; but the court

Sheriff cannot insist on his fees before execution.

court will not relieve on motion. *Heslett's case*, Sal. 331. S. P. 332, 330.

Action lies for
sheriff's fees.

The sheriff may maintain an action for his fees, for the law admitting him to take it, makes it a duty. *Ld. Raym.* 1212. *Brockwell v. Lock*, Sal. 331.

3. Of superseding Execution by Writ of Error, or otherwise.

Allowance of
error, superse-
deas;

The allowance of a writ of error is of itself a *superse-
deas* to an execution, without any notice; *Jaques v. Nixon*, 1 D. & E. 280.

use of service
thereof.

The service of the allowance is only material to bring the party into contempt, if he proceeds to sue out execution afterwards. *Ib.* *Hannot v. Farettes*, Bar. 376.

When bail in
error (if requir-
ed) must be put
in.

But although it is an immediate *superse-
deas*, yet if it be a case where bail in error is required, such bail must be put in within four days after the allowance, or plaintiff may take out execution.

This is upon the supposition that the allowance of the writ of error is not served till final judgment be actually signed; for there is no opportunity of putting in bail before judgment is signed. *Ib.*

But it frequently happens, that a writ of error is sued out, and the allowance served before judgment is signed, lest execution should issue instantly. This makes no difference, for it only operates as an allowance from the time of signing judgment. *Ib.*

So that where a writ of error was sued out and allowed on the 31st May, and on the same day a copy of the allowance was served on the plaintiff's attorney, and final judgment was signed on the 14th June, and execution sued out on the same day, within four days after which bail in error was put in; it was held well, and a *superse-
deas* to the execution, which was therefore set aside. *Ib.*

And

And the court have gone so far in support of the practice of suing out the writ of error before judgment, that if a writ of error is sued out, and the plaintiff will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the court will set the execution aside. *Ib. Aird v. Eastmead*, Bar. 260.

If therefore the writ of error be allowed after judgment actually signed, and bail in error be required, such bail must be put in within four days from the allowance; but if it be allowed before judgment signed, then bail must be put in within four days after the signing of the judgment; for the writ of error, though allowed before, can have no effect till the judgment is actually signed; nor can bail, till then, justify. *Doe v. Bracebridge*, 1 D. & E. 280. N.

If a party, after the allowance of a writ of error, and before the expiration of the four days for putting in bail, takes out execution, he does it at his peril; for if the writ of error be regularly followed up, the execution will be set aside; but if no bail be put in, the execution will stand, and the writ of error will become an absolute nullity. *Lane v. Bacchus*, 2 D. & E. 44.

If a writ of error be not returned and signed by the chief justice, it becomes ineffectual by his death; but execution cannot be taken out without leave of the court. *Writ of error must be returned and signed by chief justice.* *Cramborne v. Quennel*, Bar. 201. *Olorenshaw v. Stanyforth*; *Hayes v. Thornton*, *ib.*

The general practice used to be, that if the writ of error was returnable the same term of which judgment was, that it operated as a *superfedeas*, although judgment might be signed in the following vacation, as it would still be a judgment of the precedent term; but if the judgment was not signed till the subsequent term, and was therefore of a different term from the writ of error, that then the writ was deemed spent, and execution might issue. So that a plaintiff, when a writ of error was sued out, had only to wait till such subsequent term before he signed judgment, and by that means render the writ of error of no avail. *Warwick v. Figg*, *Former practice as to writ of error being superfedeas when sued out before judgment, and judgment not signed till subsequent term.*

Figg, Bar. 196. *Cooke v. Horrock*, *Ib.* 197. *White v. Morgan*, *Ib.* 198.

But now disallowed.

But this was a practice not to be encouraged; and the court will now set aside such execution. 1 D. & E. 280.

In what cases writ of error will or will not operate as a *superfedeas*.

Joint action against several defendants—damages 20*l.* against four of them on trial, and 5*s.* against one defendant who had let judgment go by default; writ of error brought by the four in the name of the one who was not obliged to find bail, because it was by default; and on motion for leave to take out execution against the four, notwithstanding such writ of error, the rule was made absolute on affidavit of service. *Mason v. Symmonds* and others, Bar. 202.

Where a *ca. fa.* is returnable against the principal on a particular day, before which a writ of error is allowed and served, that operates as a *superfedeas* to any proceeding against the bail, though the *ca. fa.* has lain four days in the office before the allowance of the writ of error. *Perry v. Campbell*, 3 D. & E. 390.

Allowance of a writ of error on a judgment by *nil dic* it is so entirely a *superfedeas* to a subsequent writ of execution, and all proceedings against the bail as well as against the principal, that all may be set aside upon motion. *Dudley v. Stokes*, Blac. 1183.

If plaintiff recover a judgment against two defendants in B. R., and one of them bring a writ of error in *cam. seacc.*, the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of B. R., notwithstanding the writ of error might have been quashed immediately, because not brought by both defendants. In such a case, where the judgment was affirmed in *cam. seacc.*, and costs given of the writ of error, and both the defendants were taken under a writ of execution on the whole sum, including the costs of the writ of error as well as the original sum recovered, the court permitted the plaintiff to amend his writ of execution as to the defendant who did not join in the writ of error, by deducting the costs thereof, and altering it to the

the original sum recovered. *Laroche v. Washbrough*, 2 D. & E. 737.

The court of C. B. laid it down as a general rule, that they will in no case stay proceedings or set aside an execution on account of a writ of error being brought on a judgment of nonsuit, which evidently must be for the purpose of delay and vexation. *Box v. Bennett*, 1 C. B. T. R. 432.

How, if it appear that it was only brought for delay;

And indeed both courts have of late determined, that where it manifestly appears that the writ of error is brought for delay, they will not stay proceedings in any action on the judgment, nor set aside any execution that may have issued, even since the allowance of such writ of error. *Entwistle v. Shepherd*, 2 D. & E. 78. *Carter v. Roberts*; *Butt v. Mow*, *lb. n.* in B. R.; and *Mitchell v. Wheeler*, 2 C. B. T. R. 30.; and *Goodin v. Hammond*, *lb.* in C. B.

But this should appear from the confession of the parties themselves, or the admission of the attorney of the party. *Pool v. Charnock*, 3 D. & E. 79. *Mitchell* and *Wheeler*, 2 C. B. T. R. 30.

A mere offer by the plaintiff to the defendant's attorney to waive the judgment if he would point out any error which was refused, was held not sufficient cause to stay proceedings, though plaintiff swore that the writ of error was brought for delay. *Chriffie v. Richardson*, 3 D. & E. 78.

But in all these questions the court will exercise their discretion, as they must depend upon their own circumstances.

So if a writ of error be sued out against *good faith*; as where the defendant's attorney had undertaken that the debt should be paid if the plaintiff's attorney would give time, which the latter had agreed to, provided *no delay* was intended by the other side; and after this agreement defendant brought a writ of error. Though execution be taken out after the allowance thereof, court will not set such execution aside; but as the writ of error

or if brought against good faith.

ror is strictly a superfedas, the plaintiff ought regularly to move to quash it. *Oates v. West*, 2 D. & E. 183.

In what case
bankruptcy of
defendant operates
as a superfedas.

If a writ of execution is delivered to the sheriff, and the defendant becomes a bankrupt before it is executed, the execution is thereby superseded, and the goods not bound by the delivery; for the property ceases to be in the bankrupt from the time of the act of bankruptcy committed. *Ld. Ray. 252. Smallcomb v. Cross* and another.

But *trespass* will not lie by the assignees of a bankrupt against a sheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell. *Smith v. Milles*, 1 D. & E. 475.

An execution against the goods of a bankrupt taken out after his certificate is signed by the creditors, and before it is allowed by the chancellor, for a debt existing previous to the bankruptcy, is valid; for the statute 5 Geo. 2. c. 30. extends only to executions against the person of the bankrupt.

II. Of entering Satisfaction on the Roll.

Use thereof.

Such are the methods which the law has pointed out for the execution of judgments in personal actions; and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by any compulsory process, or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable to be hereafter harassed a second time on the same account.

In B. R.

The party, or his attorney, making satisfaction, should demand of the party satisfied, a warrant or authority, directed to some attorney of the same court wherein the judgment is recovered, authorizing such attorney

In C. B.

When a judgment is satisfied in vacation time, the plaintiff should execute a warrant of attorney to two attorneys of the court, or either of them, or to any other attorney of the same court, authorizing such attorney

torney to enter up satisfaction upon the roll, which may be made out in the following form, on a slip of paper or parchment:

Trinity term, 34 Geo. 3.

Middlesex, ss. Satisfaction is acknowledged between A. B. plaintiff, and C. D. defendant, in a plea of debt for 100l. and 63s. costs.

Judgment entered of Hilary term, 34 Geo. 3. Roll 492.

T. S. attorney for the plaintiff, 15th June 1794.

This satisfaction piece must be taken to the clerk of the judgments, and he will make an entry thereof in his book of remembrances, and deliver the same over to the clerk of the treasury, who will enter the same on the roll, for which is paid in term 3s. in vacation something more.

The entry is to the following effect:

Afterwards, to wit, [on some return-day in the term; if by original, on a general return-day; if by bill, on a day certain,] in the twentieth year of the reign of our sovereign lord George the Third, now king of Great Britain, &c. at Westminster, cometh the aforesaid A. B. by his attorney aforesaid, [or by I. M. his attorney, in this behalf,] and acknowledgeth himself to be satisfied by the said C. D. of the debt and damages, costs and charges aforesaid, &c.

to acknowledge such satisfaction on record. Application must then be made to the clerk of the judgments, who will prepare a fiat, and attend with the attorney before a judge of the court, and get it signed; and then the clerk of the judgments will enter the same at the foot of the judgment, for which he will take 11. 7s. 8d. which includes all the fees. But if the judgment is above ten years standing, he will take 5s. more, as an extra fee due to the clerk of the treasury.

How to be entered.

How in C. B. in vacation.

The entry in this court is as follows:

Afterwards, that is to say, Form of entry.
on the day of

in the
year of the reign of George the Third, now king of Great Britain, &c. cometh the said [plaintiff] by A. B. his attorney, constituted by special warrant to him in that behalf directed, before one of the justices of his majesty's court of the Bench, at his chambers in Serjeant's Inn, Chancery-lane, London, and acknowledgeth that he is satisfied of the debt and damages aforesaid; therefore let the said (defendant) of the debt and damages aforesaid, be acquitted, &c.

If satisfaction is acknowledged in term time, you apply to the clerk of the treasury, who will carry the roll into court, and the secondary will enter satisfaction thereon, for which you pay 1s. per cent. for the poor's box, 2s. to the prothonotary, and 1s. to the secondary.

How to be entered in C. B. in term time.

THUS have we endeavoured to trace, step by step, the various proceedings in a suit, from its commencement to its conclusion, in all such *personal* actions (to which alone this volume of Practice is confined) wherein the contending parties proceed either by demurrer or to trial; and do not stop the cause in its progress, by suffering judgment by default.

3 Blac. Com.
423.

Although it cannot but be acknowledged that, from the formalities and niceties of the practice, delay is sometimes perhaps unnecessarily occasioned in the conduct of a suit, and thereby a degree of inconvenience results to the injured party; yet all who take a full and comprehensive view of the subject must agree, with the learned and elegant commentator on our laws, that

“ This care and circumspection in the law,—in providing no man’s right shall be affected by any legal proceeding without giving him previous notice, and yet that the debtor shall not by receiving such notice take occasion to escape from justice; in requiring that every complaint be accurately and precisely ascertained in writing, and be as pointedly and exactly answered; in clearly stating the question, either of law or of fact; in deliberately resolving the former after full argumentative discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting such errors as may have arisen in either of those modes of decision, from accident, mistake, or surprise; and in finally enforcing the judgment, when nothing can be alleged to impeach it; this anxiety, to maintain and restore to every individual the enjoyment of his civil rights, without intrenching upon those of any other individual in the nation, this parental solicitude, which pervades our whole legal constitution, is the genuine offspring of that spirit of equal liberty which is the singular felicity of Englishmen.”

A D D E N D A.

CASES of PRACTICE, *decided since the Publication of the First Part of this Book.*

THE defendant, the maker of a promissory note, was held to bail on an affidavit, stating that the defendant and the indorser were severally indebted to the plaintiff in the amount of the note: the affidavit was on one stamp only. The maker and indorser were also included in the same writ, with several *ac etiams*. A rule having been obtained to set aside the bail-bond on this defect in the affidavit, it was now opposed by

On an affidavit, that the maker and indorser of a promissory note are indebted to the holder, neither can be held to bail; and it is such an incurable defect, that if either be, he does not waive it by taking any step in the cause.

Marryatt; who relied on the defendant's having waived it, by having put in bail above, before the expiration of the time allowed for that purpose by the practice of the court.

Shepherd, in support of the rule, said there was a distinction between a mere irregularity in the mode or time of proceeding, and a defect in the proceedings themselves; that this was of the latter kind, and could not be waived by the adverse party, though the former might; and he cited *King q. t. v. Horne, ante, 4 vol. 349.* and *Goodwin q. t. v. Parry, lb. 577.*

Marryatt observed, that the two cases cited were cases on the lottery act, which expressly requires an affidavit as the foundation of the action, directing that that affidavit shall specify the amount of the penalties sued for.

The court allowed that the distinction was as had been stated, between a mere irregularity and a complete defect in the proceedings; adding, that in this case the revenue was also injured, by having only one

instead of two affidavits. Rule absolute. *Huffey v. Wilson*, 5 D. and E. 254.

If a person be arrested after the writ is returnable, the officer cannot legally detain him (though for the shortest time) till the writ be continued.

Runnington, serjeant, shewed cause against a rule to discharge the defendant out of the custody of the sheriff of Middlesex, on the following circumstances: The *capias* was returnable in three weeks of Easter, viz. on Sunday, April the 29th, or Monday, April the 30th, at eight o'clock in the morning, the defendant was arrested and detained by the officer till ten o'clock on that morning, at which time the plaintiff renewed the writ. This, Runnington contended, was a legal detainer, though the arrest was void, being made after the former writ had expired. But the court were of a different opinion, and therefore made the rule absolute for the defendant's discharge.

Writs, therefore, which are returnable on a Sunday, must be executed at latest on the Saturday before. *Loveridge, One, &c. v. Plaistow*, 2 C. B. T. R. 29.

The defendant having been holden to bail, but afterwards discharged on a common appearance, on account of the plaintiff declaring against him on a different cause of action from that mentioned in the writ and affidavit, may be again holden to bail in an action on the judgment.

This was an action of debt upon a judgment by default, (the default was in not producing the record on a plea of a judgment recovered, and a replication of *nil tiel* record,) in which the defendant was holden to bail, though he had brought a writ of error. He had been likewise holden to bail in the original action, on an affidavit that he was indebted to the plaintiff as acceptor of three bills of exchange; but the plaintiff declared against him in covenant, upon which, on application to the court, he was discharged on entering a common appearance, on the ground that the plaintiff had declared on a different cause of action from that mentioned in the writ and affidavit. The defendant now applied, by *Le Blanc*, serjeant, to be discharged on entering a common appearance, upon the ground that having been arrested and holden to bail in the original action, he ought not to be holden to bail in an action on the judgment. *Sayer* 43. *Newton v. Seymour*, 160. *Bower v. Bewett*, 2 Str. 1039. *Hall v. Hoag*, 2 Wil. 93. *Crutchfield v. Seymour*.

Lawrence, serjeant, shewed cause. The defendant having been discharged on a common appearance in the original

original action, the plaintiff has no bail; and this being a judgment by confession, there are no bail in error; which distinguishes this case from that in 2 Wil. 93. where there was a verdict, and therefore might have been bail in error. And,

The court, in the absence of the lord chief justice, held, that the plaintiff having lost his bail in the original action, though by declaring in a different form of action, was in the same situation as if he had not holden the defendant to bail at all, and therefore might hold him to bail in an action on the judgment. Rule discharged*.

The writ in this case was returnable on Tuesday the 19th of November; a declaration *de bene esse* was filed on the same day, and on that day also a four-day rule to return the writ was served on the sheriff of Middlesex, which expired on Saturday the 23d. On the morning of the 23d, the sheriff returned *cepi corpus*; and, in the evening of the same day, he was ruled to bring in the body. After the service of this rule, on the same 23d of November, notice of bail was given on the 25th (Monday); the bail were excepted to, and on the 26th notice of other bail was given, who were to justify on the first day of this term. On the last day of the last term an attachment was issued against the sheriff for not bringing in the body, to set aside which for irregularity, a rule was obtained the beginning of this term.

A sheriff ought not to be ruled to bring in the body until the day after the expiration of the rule to return the writ; and if he be, and be attached for not obeying it, the court will set aside the attachment for irregularity.

Wigley now shewed cause against that rule; contending that the attachment was regularly issued; that by a late rule of court (Mich. 32 G. 3. *vide ante*, 4 vol. 496,) it was ordered, that all writs should be returned on the same day on which the rule for returning the same should expire; that the sheriff having in this case, in compliance with the rule of court, returned *cepi corpus* on the 23d, the plaintiff was regular in ruling the sheriff to bring in the body after the return of *cepi corpus*; and that the sheriff was liable to an attachment,

* But see Barnes 176. *Wright v. Kersewill*, Str. 792. *Chambers v. Robinson*, Cow. 72. *Blandford v. Foot*. *De la Cour v. Reed*, 2 G. B. T. R. 178.

he not having justified bail before the expiration of the rule to bring in the body. *Overton's Bail*, Imp. Pract. 126.

Shepherd, in support of the rule, insisted that the plaintiff ought not to have ruled the sheriff to bring in the body until the 24th, the day after the expiration of the rule to return the writ, and consequently that the attachment, which was grounded on a disobedience of that writ, was irregular.

The court after conferring with the master said, that the rule to bring in the body was taken out too early, for that the sheriff had the whole of the 23d of November to return the writ, and that of course the sheriff could not be attached for not obeying the rule which ought not to have issued. Rule to set aside the attachment absolute. *Hutchins v. Hird*, 5 T. R. 479.

Of the four days allowed to perfect bail after exception; the first is reckoned exclusively, and the last inclusively: so that where the exception was on Wednesday, an attachment could not regularly issue against the sheriff till the Tuesday following (Sunday being no day). But though the attachment did issue on the Monday, the court would not set it aside, because the bail were not perfected.

Lawrence, serjeant, shewed cause against setting aside an attachment against the sheriff, for not bringing in the body on the following circumstances: Bail were put in on Monday the 30th of April, on Wednesday the 2d of May an exception was entered, and on Monday the 7th of May, no bail being justified, the attachment issued. This Lawrence contended was regular, because he said the bail ought to have been perfected on the Saturday preceding, viz. May the 5th, the four days allowed for perfecting bail after an exception being inclusive. On the other hand, Cockell, serjeant, insisted, that the attachment was too early; that the first of the four days was reckoned exclusively, and the last inclusively; and therefore that the attachment could not issue till Tuesday, May 8th, the preceding Monday being one of the four days. The court declared themselves of this opinion; but as the bail were not in fact perfected, they said they could not allow the present motion, and therefore discharged the rule with costs. *North v. Evans*, 2 C. B. T. R. 35.

An attachment against the sheriff is irregular, if the rule to bring in the body issues before the time for

A *testatum capias* issued into Surry, returnable the first return of last Michaelmas term, viz. November 3d; on the 6th of November the sheriff was ruled to return the writ; on the 12th he returned *cepi corpus*; on the 13th he was ruled to bring in the body; on 21st an attachment

attachment issued; on the 23d of January, the first day of Hilary term, a motion was made on the part of the sheriff to set aside the attachment as irregular, because the rule to bring in the body had issued a day before the time was out for the defendant to put in his bail; for the writ being returnable the first return of Michaelmas term, and it being a country cause, the defendant had eight days after the first day of full term, *i. e.* after the *4to die post*, to put in bail, (consequently he might have put them in on the 14th of November,) and the sheriff being only liable in default of the defendant, he ought not to be ruled to bring in the body till the time for putting in bail was expired.

putting in bail has expired; but if the sheriff neglect to apply to the court in due time to set aside the attachment, the irregularity is waived. Where a writ is returnable the first return of a term in a country cause, the defendant has eight days after the *quarto die post* to put in bail.

The court were of opinion, that the attachment was irregular, the rule to bring in the body having issued too soon: But as a week had elapsed in Michaelmas term after the attachment issued without any application to set it aside; and during that time the sheriff and the plaintiff had frequent communications together, it was holden, that the irregularity was waived; and therefore the rule was discharged. *Rosse v. Steele*, 2 C. B. T. R. 276.

Le Blanc, serjeant, for the sheriff; Cockell, serjeant, for the plaintiff.

Bail above not being put in in due time, an attachment was regularly obtained against the sheriff; but now Bond, serjr. moved to set aside the attachment on an affidavit, that the plaintiff had lost no time.

The court will set aside an attachment against the sheriff, issued on account of bail above not being put in on payment of costs, and perfecting bail where the plaintiff has not been delayed.

The court made the rule absolute on putting in and justifying bail and payment of costs; and they said that if the plaintiff had taken an assignment of the bail-bond instead of resorting to the sheriff, as the proceedings would have been staid by perfecting bail and paying the costs, it was reasonable that the same indulgence should be allowed to the sheriff, and that the practice should be uniform*. Rule absolute. *Callan v. Tye*, 2 C. B. T. R. 235.

* The same practice has been also adopted in *B. R. Hill v. Belt*, 4 T. R. B. R. 352; and the rule in both courts seems to be, that if the plaintiff has not been delayed in going to trial, the attachment shall be set aside; but if he has been so delayed, then the attachment shall remain in the officer as a security in case he should obtain a verdict.

Rule of court as to surrender being good without justifying after rule to bring in the body.

Whereas, by the present practice of this court, the bail put in for the defendant in any action cannot render such defendant, after a rule has been granted against the sheriff to bring in the body, before such bail have justified themselves in open court: It is ordered, that from and after the last day of this term, bail shall and may be at liberty to render the defendant, notwithstanding such rule, at any time before the expiration thereof, the attorney for the defendant giving notice of such render to the plaintiff's attorney without delay, and making affidavit thereof. 5 D. & E. 368.

The same practice now holds where the bail-bond has been assigned.

So after bail-bond assigned, surrender may be made without justifying.

Edwin v. Allen, Michaelmas term, 34th G. 3. B. R. 1793, Seldon shewed cause against a rule obtained by Baldwin, why all the proceedings on bail-bond assigned should not be stayed on payment of costs, defendant having put in bail above and rendered; upon the ground, that though bail above had been put in, they had not justified; which, according to the practice of this court, they ought to do to warrant a surrender: by a late case in C. B. their practice was altered, and was now otherwise. Court held, that the practice of C. B. was the most proper; that this court meant to adhere to it, and that there was no occasion to justify in order to render, though bail-bond had been assigned; but that formerly the practice of the court was as stated; and afterwards in Hilary term, *Meysey v. Carnell*, was decided on the same point. 5 D. & E. 534.

Surrender may be made by bail who have been excepted to and have not justified, although other bail have been added, and one of the added bail rejected.

Marryatt moved to set aside an attachment obtained against the sheriff of Essex, upon the ground that a surrender had been made, and notice thereof given, before issuing the attachment. Two bail had been originally put in, which were excepted to. Two fresh bail were added, and notice to justify was given; one only justified, the other was rejected. Two days further time was given to put in another bail in the room of the one rejected, but before that was done, defendant surrendered. The rule on sheriff to bring in the body having expired, attachment issued. Seldon shewed cause, upon the ground that the two first bail had been abandoned, by

by fresh bail having been added and coming forward to justify; and that as no other bail had been put on the bail-piece in the room of the one rejected, and as one bail was as no bail, that the surrender was irregular for want of bail being put in, and therefore attachment ought to go; for that although bail need not justify, yet bail must be put in as ground for a surrender; but court held, that as the two first bail were not struck out of the bail-piece, they were still liable on their recognizance, and competent to surrender. *The King v. Sheriff of Essex*, East. 1794. B. R.

E R R A T A.

IN page 55. l. 11. it is said, that "*minors cannot be arrested*;" but this must be understood with a very considerable qualification; for they may be arrested for debts above 10*l.* contracted by them for necessities; and even should they be arrested for any other cause, when in strictness they may not be liable to the action, yet the court will not discharge them upon motion, but will put them to their plea of infancy.

In page 139. l. 32. for *judgment shall not be arrested* read *judgment shall be arrested*.

In page 177. for *Bar. 46.* read *Bar. 60.*—dele 172.

In page 327. for 2 *Lil. Reg. 299.* read 140.

In page 541. in margin, for *persecution* read *execution*.

In page 569. in margin, for *command* read *commission*.

APPENDIX.

IT was the intention of the Editor (as appears by various references in the course of the Volume) to have here subjoined, by way of APPENDIX, certain *Notes*, explanatory of the jurisdiction of the respective Courts, and illustrative of their practice; but finding, in the progress of the Work, that, from the multiplicity of matter necessary to be comprized in the present Volume, such an Appendix would swell it to too great a bulk; and conceiving, that it would less interfere with the general Plan if inserted at the end of the Work; the Editor has thought fit to postpone it to the conclusion of the next Volume; in the completion of which, all due dispatch will be used. In the meantime, the Editor has endeavoured to render the present Volume as useful as possible, by making it though only a *Part* of a Work, as a detached and unconnected *Whole*, so far as it goes.

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